Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CAROLYN ANN LAFAVRE, also known as Carolyn A. Howerter, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers who reside in Kansas,

Petitioners,

v.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE; TIM SHALLENBURGER, as State Treasurer of Kansas; STEPHEN S. RICHARDS, as Secretary of Kansas Department of Revenue and as acting Director of Kansas Division of Taxation; DAVID J. HEINEMANN, as agent and designee of Secretary of Revenue, and of Director and Division of Taxation of Kansas Department of Revenue, and as representative defendant of a class of employees and agents of Kansas and the Kansas Department of Revenue,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners bring a facial challenge to K.S.A. § 79-32,110 under the doctrine of "hostile state invasion," presenting the substantive questions whether (i) there is a fundamental right of United States citizens "to be and remain single," *inherent* in the citizens themselves via the "liberty interest" and associational interests secured by the First and Fourteenth Amendments, and whether (ii) exercise of such right was penalized by unique "surtax" levies imposed on *all* unmarried individuals pursuant to Kansas' particular "income tax" regime (1988-97). Principles of "classification" (viz., sustaining the so-called federal "marriage penalty") are not invoked here.

2. Does a federal court have original jurisdiction under 28 U.S.C. § 1343(a)(3), 42 U.S.C. § 1981(a), (c) and 42 U.S.C. § 1983 (prescribing a "suit in equity"): (i) first to address the inherent fundamental rights asserted, and (ii) to strike the penalties imposed under the regime and order the equitable remedy of ministerial reassessment to the mass of afflicted single citizens of Kansas (against Kansas or its officials), or does current Eleventh Amendment doctrine of *inherent* state immunity (or a notion of tort) preclude any exercise of original jurisdiction?

3. Is jurisdiction over petitioners' "suit in equity" defeased or mooted by the repeal of the challenged Kansas levies in 1998, where (if petitioners are correct) "valid" saved tax rates are undetermined for the prior years of the regime and "valid" income taxes have thus never been assessed, and where respondents' retention of the challenged monetary penalties is ongoing?

4. Did the Kansas legislature "consent" to jurisdiction in federal court via the remedial taxpayer "suit" recognized in 1933 (now contained in K.S.A. § 79-3230(d)), in the event that under subsequently evolved administrative doctrine officials would assert their own "clear statement" that Kansas denies mass tax refunds for systematic assessment illegalities or state-wide constitutional infirmity, and where Kansas courts now "clearly" impose a "no suit" refund regime, mandating administrative claims multiplicity, citizen by citizen?

The question is simply whether remedial background principles under the Fourteenth Amendment control construction of the statute in favor of citizens, or preclusive principles under the Eleventh Amendment should apply in favor of Kansas, on citizen claims secured by the Constitution.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's Memorandum and Order (per Rogers, J.) granting respondents' pre-answer motion (F.R.C.P. § 12(b)) to dismiss the Complaint "for lack of subject matter jurisdiction," Appendix ("Pet. App.") 12a-15a, is unpublished. The court of appeals' Order and Judgment (per Tacha, C.J., joined by Seymour and Brorby, J.J.) affirming such dismissal (Pet. App. 1a-11a) is unpublished. The court of appeals' order denying rehearing en banc (*id.* 16a-17a) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals entered its Order and Judgment on April 3, 2001, and denied rehearing en banc on May 14, 2001. Justice Breyer extended the time for filing this petition to October 11, 2001. App. No. 01A126. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of Section 1 of the Fourteenth Amendment, 28 U.S.C. § 1343(a)(3), 42 U.S.C. § 1981(a) and (c), 42 U.S.C. § 1983, and Kansas Statutes Annotated ("K.S.A.") § 79-3230(d), K.S.A. § 79-32,105(a)-(c), and pertinent parts of laws amending the levying sections of K.S.A. § 79-32,110 (during 1988-97), relevant to this petition, are reprinted in Appendix D at 18a-26a . Petitioners' unamended Class Action Complaint ("Complaint") at issue here appears at Appendix E, 27a *et seq.*

STATEMENT OF THE CASE

Under Supreme Court Rule 14.1(g)(ii), the "basis for federal jurisdiction" in the district court *is* this Statement of the Case. Inquiry as to jurisdiction requires an important "first step," which ". . . is to identify with some precision the scope of the constitutional right(s) at issue." *Board of Trustees of the*

University of Alabama v. Garrett, 531 U.S.__ (February 21, 2001) (Rehnquist, C. J.), Part II, slip op. at 7. Petitioners present a case of Justice Kennedy's metaphysics of fundamental rights. Kennedy, Anthony M., *The Constitution and the Spirit of Freedom*, National Legal Center for the Public Interest (Washington, 1990), pp. 10-17. The single individual's "inalienable right" (to remain so), if "invaded" or penalized, raises therefore a classic case of "alienation" of state sovereignty.

Petitioners assert an absolute fundamental right of unmarried persons "to be and remain single," and invoke limitations imposed by Section 1 of the Fourteenth Amendment on Kansas. The essence of those limitations is that "no state shall . . ." penalize or license the exercise of citizens' own fundamental rights. If there is (1) an inherent fundamental right of United States citizens to be and choose to remain single, and if there is (2) "a suit in equity" for constitutionally compelled equitable redress for Kansas-imposed penalties levied on all its single citizens, then the district court has original jurisdiction. 28 U.S.C. § 1343(a)(3).

Since marriage is good, the Kansas Supreme Court decided on December 20, 1996 that Kansas could levy systematically higher income tax *rates* against the taxable income of *all* single individuals. It staked its opinion on Kansas' legislative power to "classify." *Peden v. Kansas*, 261 Kan. 239, 930 P.2d 1 (Kan. 1996), *cert. den.*, 520 U.S. 1229 (1997) ("Peden"). Petitioners later filed this "suit" in federal court, contending not so, where exercise of a fundamental right inherent in all citizens themselves (here, to choose marriage or not) is systematically penalized by mathematically explicit state law. ***Petitioners do not challenge accepted equal protection folklore about statutes structured similarly to I.R.C. § 1, which "classify."*** "Classification" is the wrong issue. Complaint, ¶30. Pet. App. 47a.

Petitioners seek an equitable order for official reassessment of correct, "saved," Kansas income tax for the years at issue (1988-1997). Single Kansans have already filed their annual K-40 returns, and paid in the sums levied. Whether Kansas, *eo nomine*, stays as a defendant or is dismissed does not control

the question of citizens' rights to practical equitable redress. The ministerial work is in the future, and the ministers do it. See text at n.9, *post*.

Except in Kansas, it has gone undoubted that United States citizens have a fundamental right to refrain from marriage, but that is actually the first important Question Presented. Though single people can be "classified," they have never been explicitly surtaxed. In *Bayside Enterprises, Inc., v. Carson, et al.*, 450 F. Supp. 696, 704 (M.D. Fla. 1978), the district court discoursed with clarity about targeted burdens on the exercise of fundamental rights, as to exotic dancers (". . . a state may not impose a charge for the enjoyment of a right granted by the federal constitution"). Petitioners have been "surtaxed" more directly than Christopher Lunding. *See Lunding v. New York State Tax Appeals Trib.*, 522 U.S. 287 (1998). Systematic rates, contained in K.S.A. § 79-32,110, targeted and penalized *all* single people (1988-1997). The Kansas regime did not merely differentiate married and single persons via separate income bracketing, as seen in I.R.C. § 1, 26 U.S.C. § 1 (which levies the same graduated *rates* on all). *See* Part III, *post*, at 16.

Kansas has been awarded "inherent" immunity in federal court, but petitioners contend that background "due process" principles of fundamental rights to sue for equitable redress dictate, again, not so. *Petitioners never assailed Hans v. Louisiana,* 134 U.S. 1 (1890). They resist here in a case of "wanton invasion" by Kansas, seeking restitution of their own property, as suggested in *Hans*, 134 U.S. at 20-21. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79-80 (2000), Part IVA, actually invites "additional meaningful debate" as to "inherent" fundamental rights of citizens, when pitted against "inherent" sovereign immunity of the states. Citing *Kimel*, the panel declined the work. Pet. App. 4a, 5a, 11a. Petitioners assert that "hostile state invasion" under the Fourteenth Amendment is the ground left open by *Kimel*, by Justice Bradley, and by Justices Kennedy and O'Connor, concurring in *Board of Trustees of the University of Alabama v. Garrett, supra*, slip op. at 18(1).

The district court handled this matter as a damages case, dismissing against Kansas and the other official defendants on

pre-answer motion for sovereignty-based reasons. Pet. App. 13a, 15a. The panel affirmed, *holding explicitly that restitution of the penalties, upon ministerial reassessment sought by petitioners, would be the same as "money damages" for "past alleged wrongs."* Pet. App. 7a-8a, 10a. Such is an important holding to any taxpayer in the United States, and it is unsupported by any decisions of this Court. *Cf., McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 51 (1990), n.35. It is contrary to a rational reading of 42 U.S.C. § 1981(a) and (c) and 42 U.S.C. § 1983, and implies a profound limitation on the remedial (equitable) powers of a federal court. If the panel is right, then the ancient distinction between equitable restitutional relief and damages, bespoke by *Bowen v. Massachusetts*, 487 U.S. 879 (1988), must be rethought. Judge Lamberth has been wasting his time. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 38 *et seq.* (D.D.C. 1999), *aff'd, see Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001). *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), becomes a one-off aberration, dangling.

The Framers applied explicit *equitable* theory, if a state collected an import tax in defiance of the "no state shall" prohibition of Article I, Section 10. Any such money was "for the use of the . . . United States." Petitioners now seek an equitable order which will reverse the Kansas penalties. Their claim is not literally tort-infected, nor is it tort-defined. Neither was K.S.A. § 79-3230(d) (enacted in 1933). Neither are the "no state shall" mandates of the Fourteenth Amendment, as implemented in the civil rights statutes. Neither is *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 723-725 (1998) (Souter, O'Connor, J.J., concurring), indicating that any property owner ought to get his property back if taken by an unconstitutional tax. There is no equity here, in Kansas' ". . . retention of money to which it never had a valid claim." *Ibid.*

Hamilton's famous paragraph in Federalist No. 81 links "inherent" sovereignty to non-suability (first sentence). The fourth sentence introduces an antidote: "alienation of sovereignty." The need for the antidote was explicated in the last

paragraph of Federalist No. 31. It was exemplified in Federalist No. 32 in a case of "immediate constitutional repugnancy," which "alienates" state sovereignty. At that time an explicit state tax on imports was a prime example, viz. Federalist No. 33, of *state* usurpation.

Since 1868, the "no state shall . . ." mandate of the Constitution is not restricted to voiding state import taxes, or otherwise controlling state usurpations of federal structural prerogatives. Petitioners here invoke their *own* substantive liberty interest against a usurping Kansas and officials pursuant to Section 1 of the Fourteenth Amendment, *simpliciter*. Amar, Akhil R., *The Bill of Rights*, Yale University Press (New Haven, London, 1998), Part II. They want their own money back, *ad restitutionem*.

I. This Case in Context of Doctrines of Hostile State Invasion and Equitable Jurisdiction

This Court's latest cases involving federalism have pitted legislative enactments by a usurping Congress against the inherent prerogatives of the states. They arose via individual actions on novel claims that did not exist otherwise. Much of the recent discourse about *inherent* state "immunity" simply doesn't apply to the distinct matter of timeless due process citizen redress against a usurping or "invading" state. As Dean (and former Solicitor General) Griswold elegantly put it: ". . . STATUTES. . . . There is no use in thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute." Griswold, Erwin N., *Federal Taxation, Cases and Materials*, Fifth Ed., The Foundation Press, Inc. (Brooklyn, 1960), at p.15. Likewise, if Alabama, Florida, and Maine should enact licensing levies or surtaxes on crippled people, old people, grandparents, short-residence citizens, or on celibate persons, the "great thoughts" and the cases change. *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936)

* * *

The court of appeals' diagnosis of the reassessment remedy sought, applying a dose of preclusive immunity-federalism, raises another eminent law school Dean's important point. Jeffries, John C., Jr., *Disaggregating Constitutional Torts*, 110 Yale L.J. 259 (2000), at 290: "Decoupling damages from injunctions at least ensures that remedial difficulties applicable only in one context do not automatically infect others." The "infection" below was that doctrinal tort-based thinking led to the wrong "first step." This case is not like a tort action against the state police (or Kentucky); petitioners raise no novel (or Congressionally concocted) "damage" claim over employment. Restitution is not damages. The money came from petitioners. *See Cobell v. Babbitt, supra*, 30 F. Supp. 2d at 41, 91 F. Supp. 2d at 28 (before affirmance) (". . . this is plaintiffs' own money. . . .").

"Taxes" are now exclusively imposed by governments. They were always supposed to be grants of money from the subjects themselves, originally voted by Parliament to the King. They were re-dedicated for "government" by Parliament no later than the time of John Locke, and William and Mary. Dickson, P.G.M., *The Financial Revolution in England*, MacMillan (New York, 1967). Governments are not widely thought to suffer "damages" if they refund or credit money collected under unconstitutional laws. No "sane" Congresses (from 1866-1875 through 1991) could have produced the last phrases of § 1981(a) and of § 1981(c), in light of § 1983 and 28 U.S.C. § 1343(a)(3), without implicating state laws, governments and officialdom in federal court.

The panel announced otherwise. Pet. App. 10a. Meanwhile in the Sixth Circuit, § 1981(a) and (c) are being construed to focus on state governmental authority and action, as does § 1983. *Chapman v. The Higbee Co.*, __ F.3d __, 2001 WL 753504 (6th Cir., July 5, 2001) ("No one can seriously argue that an individual can subject another . . . to unequal punishment or taxes." Suhrheinrich, J.). Such being intuitively correct, an important tension arises with the result below. Further "abrogation" by Congress would be required to find *any* suable state-tax imposing defendant.

Justices Scalia and Thomas raised the subject of tort theory run amok, in *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (dissenting), and raised the prudential standard of ". . . what any sane Congress could have enacted" as to § 1983. Petitioners raise the corollary question, then, whether notions of state tort "immunity" likewise did not run amok below, so as to destroy core federal subject matter jurisdiction over "suits in equity" raising inherent fundamental rights which are "secured by the Constitution" to United States citizens against the states. 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983 make sense literally for this action, if they are purged of tort infection.

"Taxes" were added to the civil rights statutes in 1870, alongside "penalties." *San Mateo Co. (Cal.) v. Southern Pac. R. Co.*, 13 F. 145, 150-151 (C. C. Cal. 1882) (Field, J.). So-called "tax" statutes differ widely, labeling aside. *Bailey v. Drexel Furniture Co.* (the Child Labor Tax Case), 259 U.S. 20, 37 (1922) ("Scienter is associated with penalties not with taxes.") (Taft, C.J.); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 420, 6 L. Ed. 679 (1827) (so-called regulatory measure was a void state "import tax"). They are always levies, with different nature and effect. *Stewart Dry Goods Co. v. Lewis (II)*, 294 U.S. 550, 555 (1935).

Petitioners posit that Justice Scalia (in *Crawford-El*) made *their* point, squarely, by citation to Justice Frankfurter's dissent in *Monroe v. Pape*, 365 U.S. 167 (1961). Part III illustrates the matter raised here (citing early authority that "The object of the act was . . . to forbid the execution of state laws, which, by the act itself, are made void."). *Id.*, 216. The bedrock grievance ". . . that behind a [state statutory] constitutional violation lay the whole power of the State, that was the danger. . . ," *id.* 257, is explicated in Part V.

The second important Question Presented is thus whether a citizens' facial challenge seeking to void state law levies is not the essence of § 1981(a) and (c) and § 1983, "in equity." Justices Scalia and Thomas, as well as Dean Jeffries and others, may be right or wrong to suggest that *Monroe v. Pape*, *supra*, was incorrectly decided. *See* Jeffries, *supra*, 259. But it was a tort

case. The classic cases of "hostile state invasion" via repugnant state statutes are not tort cases. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (the Kingfish's unique "press tax" was struck); *Truax v. Raich*, 239 U.S. 33 (1915) (Arizona disemployed all the foreigners). *Cf.*, *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938), at 152 n.4. There was no tort-infected language in *Savings & Loan Assn. v. Topeka*, 87 U.S. (20 Wall.) 655, 663 *et seq.* (1875) (Miller, J.) (defining "taxes," but positing state mandates and amercements which *no court* would hesitate to void, viz., where B is declared wife of D).

As to "money damages from the state for past alleged wrongs," they were never appropriate here under F.R.C.P. § 54(c). Below, the specific penalty math was euphemized out of the statutes, Pet. App. 7a ("disparity" was "eliminated"), and the Complaint, e.g., ¶19. Pet. App. 41a-43a.

* * *

The Kansas levies here, as in a few other important cases, were ". . . utterly outlandish when measured against the historical and current practices of every other state." *See* Amar, Akhil R., *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (Nov. 2000), at 124, referencing *Troxel v. Granville*, 530 U.S. 57 (2000), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), discussing unenumerated "due process" rights, and "privileges and immunities."

Troxel discourses as to "relative" rights of parents and grandparents, which are fundamental, but not absolute (per Stevens, J.). As to *absolute* rights, Blackstone put them as: "Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons." Before single persons contract the *relation* of marriage, they are endowed with absolute freewill. *Blackstone's Commentaries on the Laws of England (1765), Legal Classics Library (Birmingham, 1983), Book One, Ch. I, "The Rights of Persons,"* 119-122. Absolute rights were *inherent* in persons. Laws are supposed to ". . . protect, and enforce such rights as are absolute. . . . "

Id. In America, the Fourteenth Amendment makes hostile state invasion via state statutes a federal case. The important substantive question is whether Kansas "invaded the territory" reserved for absolute citizens' rights.

Individuals, unlike corporations, may not be taxed for the privilege of existing. *Redfield v. Fisher*, 135 Ore. 180, 197, 292 P. 813, 819 (Ore. 1930), *reh. den.*, 295 P. 461 (Ore. 1931). Preachers may be taxed, but not for preaching. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (flat tax on religious proselytizers). Same as to "privileges and immunities" of non-residents working in New York. *Lunding v. New York Tax Appeals Trib.*, 522 U.S. 287 (1998) (New York could tax Lunding, but it was "surtaxing" the alimony of non-residents, which "smacked" of a penalty) (O'Connor, J.). In Montana, in the early part of the last century, a $5 local head tax on bachelors (vs. $2 on "heads of families") was struck. *State v. Gowdy*, 62 Mont. 119, 203 P. 1115 (Mont. 1922). In part, it was "punitory;" it reached persons who for various reasons could not be "heads of families."

* * *

On April 14, 1993 the *Peden* plaintiffs started litigation in state court, raising the wrong claim ("equal protection"), yet seeming to come out winners in the trial court by late 1995. The trial judge struck the top bracket rates for lack of a "rational basis." The single masses were hopeful in 1996, some filing administrative claims of their own, most not. Not that anyone really knew exactly what to do, but it wasn't their fault. *The trial judge had not said what "the correct tax" rates (bottom to top) actually were.* The masses kept waiting and paying. Then came reversal on the merits (of the wrong claim) by the Kansas Supreme Court on December 20, 1996. Administrative claimants had been notified by the Kansas Department of Revenue that *Peden* would decide everything; their claims were put on hold. They were told that the Department's Orders were "binding." Complaint ¶¶ 9, 33, 34, 39, 47. Pet. App. 34a-35a, 48a, 50a, 53a; Doc. 17 in the district court (Appendices 1-4 therein).

Opposing the petition for certiorari filed here, Kansas opened its Brief with a statement to this Court that it had "repealed" the statutes. Respondents' Brief in Opposition, *Peden v. Kansas*, S. Ct. Case No. 96-1459, p.1. Thus, *no problem for the future. Id.*, pp. 8, 17. In fact Kansas resolutely stayed with the surtax system for 1997 (viz., top bracket single persons paid a rate of 7.75%, versus 6.45%, tops, for married persons, a "surtax" of 20.16%). 1997 Session Laws of Kansas, Ch. 41, Sec. 13 (signed by the Governor on April 4, 1997). Pet. App. 25a-26a. Kansas did not actually repeal the surtax levies until 1998. 1998 Session Laws of Kansas, Ch. 130, Sec. 19. The single masses kept paying for 1997 too, being told that the law was "let stand." They didn't know the difference between federal folklore applied *Peden*-style, and a systematic penalty on their fundamental rights.

Such introduces the third Question; the panel declined equitable jurisdiction because of the 1998 statutory repeal. Pet. App. 7a, 10a. United States citizens have now been dismissed in federal court, while finally raising the real "fundamental rights" question and seeking the right equitable remedy, of ministerial reassessment for the masses. The Tax Injunction Act, 28 U.S.C. § 1341, might well have prevented a pre-deprivation federal injunction, effectuating a logical address to comity, directed by a sane Congress. Now that the taxes *are* collected, it results below that the Eleventh Amendment is held to render any federal equitable relief, via reassessment, impossible under the panel's "damages" for "past conduct" simile.

The "preceding unconstitutional harm" thus far floats free. *Cf., United States v. Hatter*, 532 U.S. __ (May 21, 2001), Parts V-VI (Breyer, J.). This farcical result is not the vision of federal jurisdiction, or comity, or equity or citizen access to court about constitutional rights, depicted in *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) (see both Rehnquist, C. J., at his n.4 and citing *Grosjean*, *supra*, and Brennan, J., at his n.8, explaining that 28 U.S.C. § 1341 does not warrant a state's keeping the money *after* a tax is declared unconstitutional); or *California v. Grace Brethren Church*, 457

U.S. 393, 414 (1982) (it was palpable that California itself *would* remediate its citizenry); or *Douglas v. City of Jeannette*, 319 U.S. 157(1943) (civil rights statutes and multiplicity *would support federal court taking original jurisdiction*, but facts were not the same in the various criminal cases); or *Dows v. The City of Chicago*, 78 U.S. (11 Wall.) 108, 112 (1871) (multiplicity changes things).

* * *

In raising the fourth Question, petitioners ask the court to revisit the "clear statement" rule of consent, re-examining the three state corporate tax cases it decided in the 1940s. Petitioners believe that rule was in fact consistent with the "real world" postulate of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. __ (April 30, 2001). The "clear statement" from the tribe was that "no court on earth" could enforce the arbitration award. That was a false postulate. Here, the question is whether the appropriate "renvoi" is to the Fourteenth or Eleventh Amendment. There are tacit remedial postulates and case-specific predicates in *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Ford Motor Co. v. Dept. of Treas. (Ind.)*, 323 U.S. 459 (1945); and *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 579 (1946). The courts below failed to note that none of the foregoing foundational consent cases involved (1) a fundamental rights-based facial challenge, or (2) a "clear statement" of mass-citizen claims "multiplicity," or (3) state disremediation via administrative or judicial practice, and (4) an otherwise dubious statutory action with insufficient assets behind it. They *all* involved (1) a state court refund action "clearly" available, (2) no facial challenge based on fundamental rights, (3) state court doctrine to be applied to state law ("first") on the discrete facts, (4) well-financed foreign corporations, and (5) no citizen "multiplicity."

In 1933, the Kansas legislature did not foretell a judicial "occlusion" of Kansans' remedies or a "blackout" via later evolved administrative law. Two months after the decision in

Kittredge v. Boyd, *infra*, they enacted and never repealed K.S.A. § 79-3230(d), which is remedial. Pet. App. 20a. Latterly, Kansas stands on claims "multiplicity" and series of useless administrative ceremonies. *Dean v. Kansas*, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992).

Some "court on earth" *can* hear this case, and remediate United States citizens. The question is whether any Kansas legislature really thought otherwise, and whether such is *thinkable* under K.S.A. § 79-3230(d) "in the real world." *Cf., George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378, 382-83 (1933); *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

II. The Claimants and the Remedy

Petitioners bring their "suit in equity" on behalf of United States citizens who were (1) single residents of Kansas, for some or all of the years 1988-1997, and who (2) filed Kansas income tax returns for such taxable years with respondent Kansas Department of Revenue. Such citizens have made annual payments of purported Kansas income tax from their own funds via (i) wage withholding, (ii) quarterly estimated income tax payments, or (iii) their own checks sent with their returns. Annual Kansas income taxes (at the challenged rates) were administratively assessed and charged against petitioners by the Department, from information as to name, filing status (married or single), and Kansas taxable income as reported in the respective returns (Form K-40). If the returns themselves, upon administrative assessment, reflected taxpayer overpayments for any given taxable year, then the amount thereof was either credited forward or refunded. K.S.A.§ 79-32,105(c). Pet. App. 21a.

Individual forward credit balances are in limbo until correct tax rates are judicially found. This case does not involve any taxpayer-initiated or Kansas administrative changes (post-return) to discrete individual information concerning the computation of anyone's Kansas taxable income. If every single citizen of Kansas filed refund claims today, Kansas would have no *new information*

to administer. A court and a defendant are required, for a decision on the "saved" tax rates. "Multiplicity" is the reason petitioners seek a federal chancellor. Complaint, ¶¶ 5-8, 43 *et seq.* Pet. App. 32a-34a, 52a *et seq.*

The named and served defendants are Kansas, and in official capacity, the Kansas Department of Revenue (which seems to defend for all parties here), the Secretary of Revenue, the State Treasurer, and the Director of Division of Taxation of the Kansas Department of Revenue (which office was filled by the Secretary "acting," now and at the filing of this suit). The officials are subject to equitable orders; that's why they are defendants. They will have a ministerial role. Refunds are to be handled from money which is ". . . set apart and maintained by the director. . . ." K.S.A. § 79-32,105(b).

K.S.A. § 79-32,105(c) itself imposes a ministerial refund if too much money has been collected. Under "federal conformity," binding on Kansas, the officials' authority would clearly extend to correcting tax assessments ". . . accruing under any former . . . [Kansas] . . . internal revenue law." *Cf.*, I.R.C. § 6201(a), 26 U.S.C. § 6201(a); Kansas Constitution Art. XI § 11; K.S.A. § 79-32,109(a); K.S.A. § 79-32,117d.

If the regime was unconstitutional, then equitably the penalty element of the funds levied and retained is still the citizens' money. Kansas should not appropriate such funds, under Kansas' own equitable doctrine. The defendant Treasurer thus should not expend them; any legislative attempt otherwise would be void. *Kittredge v. Boyd*, 136 Kan. 691, 695, 18 P.2d 563, 565 (Kan. 1933). To leave such funds with Kansas amounts to unjust enrichment. *Cf., Montana v. Crow Tribe of Indians*, 523 U.S. 696, 723-725 (1998); *Atchison, Topeka & S. F. Ry. Co. v. O'Connor*, 223 U.S. 280 (1912); *United States v. American Tobacco Co.*, 166 U.S. 468 (1897) (U.S. does not suffer any "actual loss" by repayment of money "it has no equitable right to retain"). Other state courts faced with similar situations have held as much, in cases of administrative illegality, systematically practiced on the masses. *Javor v. State Bd. Equalization*, 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153

(Cal. 1974); *Santa Barbara Optical Co. v. State Bd. Equalization*, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (Cal. App. 1975); *Ware v. Idaho State Tax Com.*, 98 *Id.* 477, 567 P.2d 423 (*Id.* 1977). It is much, much different in Kansas, lately. *Dean v. Kansas, supra.*

Petitioners' ancient common law and constitutional right is to get their own money back, if their claim is secured in the constitution. *DeLima v. Bidwell*, 182 U.S. 1, 180 (1901) (". . . plaintiffs were at liberty to waive the tort and proceed in assumpsit" regardless of a remedy [or not] under the relevant U.S. customs administrative act; the "tax" question was actually about United States constitutional sovereignty over Puerto Rico); *Atchison, Topeka & S. F. Ry. Co. v. O'Connor, supra* (sustaining original jurisdiction in federal court, and assuming the collected state tax money to remain an "identified trust fund;" assuming further that the plaintiff's constitutional claim to the money was "paramount" to that of the state) (Holmes, J.). Federal law mandates no tort, but the constitution mandates redress. *Cf., Burrill v. Locomobile Co.*, 258 U.S. 34 (1922) (Holmes, J.); *Cyprus Amax Coal Co. v. United States*, Georgetown.edu/Fed-Ct/Circuit/fed/op./99-5060 (Fed. Cir. 1999), *cert. den.*, __ U.S.__ (6-4-2001). The ancient way was assumpsit against the collector. *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

Ministerial reassessment of valid income taxes at valid rates (after application of federal and Kansas "savings" and severance doctrine) is the practical statewide remedy. *United States v. Osage County (Okla.)*, 251 U.S. 128, 132-4 (1919), indicates an "appraisement to correct systematic overassessment." *Jackson Co. (Kansas) v. United States*, 100 F.2d 929 (10th Cir. 1939), *mod.*, 308 U.S. 343 (1939), indicates full restitution (without interest) of the invalid portion. *Montana v. Crow Tribe of Indians, supra*, indicates disgorgement on equitable principles.

There is no "as applied" problem involving the reach of Kansas revenue laws (or its geographical sovereignty). Compare, *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573, 579 (1946) (the state law question over the reach of the Utah statute had to be decided first by state courts; a "clear statement" would be prudential, for federal court to pre-empt state review), and *Ford Motor Co. v.*

Dept. of Treas. (Ind.), 323 U.S. 459 (1945). There is no reason here to ask Kansas again. *Cf.*, *Stewart Dry Goods Co. v. Lewis (II)*, 294 U.S. 550, 561 (1935) (where the highest Kentucky court had validated the challenged law in a separate case); *Grosjean v. American Press Co.*, *supra* (Louisiana would not restitute). The core comity concerns of 28 U.S.C. § 1341, and the prudential rule bespoke by *Kennecott Copper Corp.*, *supra*, are not implicated.

III. Further Background of the Kansas Surtax and This "Suit in Equity"

In 1988, Kansas installed a new set of separate income tax rates, directed solely at single persons, which were legislatively fixed at higher percentages than the rates set for married persons, up and down the income scale. No percentage rate fixed on single persons could be found in the levying statutes directed at married persons. The enactment background and technical genius of the new regime are outlined in the Complaint, Count I. Pet. App. 37a-43a. Single persons were all "surtaxed."

Congress has never done any such thing, via I.R.C. § 1, or otherwise[1], and neither has any other state income tax law.

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1. *Johnson v. United States*, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd. sub nom. Barter*, 550 F.2d 1239 (7th Cir. 1977), *cert. den.*, 434 U.S. 1012 (1978), addresses the so-called federal marriage penalty, and distinguishes the problem presented by the Kansas regime. Since I.R.C. § 1 has never systematically, rate-wise, "penalized" all married or all single persons, it was easy (and correct) for the district court to hold that the right to marry and right of "free exercise of religion" (which are joined at the hip) were not systematically burdened. 422 F. Supp. at 971, 972 *et seq.* Indeed, the Constitution grants no federal power to impose a direct systematic burden on marriage or upon single people; the First Amendment and due process protection of fundamental rights would flatly proscribe any such attempt. In *Vivien Kellems*, 58 T.C. 556 (1972), *aff'd. per curiam*, 474 F.2d 1399 (2d Cir. 1973), *cert. den.*, 414 U.S. 831 (1973), it was obvious that Congress had not intended to regulate, or restrict, or penalize single persons. 58 T.C. at 558. There has never been a federal "singles penalty." The only way Ms. Kellems could have engineered a 42% singles detriment (for

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Kansas had never purported to exert any coercive power over the choice of single people as to whether and when to marry. Historically, no such coercive power exists. *See* n.4, *post*. As to marriage, in 1980 and 1990, starting at age 45 and up, there were more Kansas single women than men. Starting at age 55, on up, in 1990, there were 3.28 unmarried women for each single man in Kansas according to the U.S. Census. No sovereign power on earth could have married all of them by classifying and taxing.

* * *

On December 20, 1996, the regime was sustained by the Kansas Supreme Court, solely on "rational basis" equal protection[2] analysis. *Peden v. Kansas*, 261 Kan. 239, 930

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the 1965 year at issue) would have been to assume her marriage to a notional man who contributed zero taxable income to the joint enterprise, but supported himself without any money from her. A real cipher. So too, in *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978), *cert. den.*, 439 U.S. 1046 (1978), the court saw that the so-called federal "marriage penalty" is not systematic; rather it ". . . is suffered not for marrying, but for marrying one in a particular income group." The charts at 576 F.2d 905 tell the tale. Here, the Complaint, ¶19, tells an aberrant tale. Pet. App. 41a-43a. Kansas was surtaxing all single people, not graduated income. As for federal legislative grace, Justice Ginsburg proved 30 years ago in the 10th Circuit that grace has its limits where "invidious discrimination" is involved, even with deductions, as to a man who had never married. *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. den.*, 412 U.S. 906 (1973).

2. The right issue (penalties on "fundamental rights") could not have been reviewed here under Supreme Court Rule 14.1(g)(i). Mr. Peden's petition for certiorari, S. Ct. Case No. 96-1459, could raise only the "wrong issue" of "equal protection." It depicts only part of the systematic bite of the statutes: they targeted all single persons, not just top income bracket people. *Peden* bespeaks a grand "originally unlitigated third party mistake" and has no bearing here. *See Montana v. Crow Tribe of Indians*, 523 U.S. 696, 724-725 (1998) (Souter, O'Connor, J.J., concurring).

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P.2d 1 (Kan. 1996), *cert. den.*, 520 U.S. 1229 (1997). Since the "benefits of marriage never end," the top bracket surtax (for example, 7.75%÷6.45%=20.16% "surtax" for 1992-1997) could never end as long as a citizen remained single. Petitioners compute that a single person who earned $10,000 in annual Kansas taxable income, during the regime, was "surtaxed" $840, without interest. It goes up from there.

Kansas single persons could be classified "differently."[3]

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On the same day certiorari was denied in *Peden*, Christopher Lunding's writ was granted. He had raised the right issue, which was New York "surtaxes" on his alimony, thus "penalizing" his "privilege and immunity" to travel to New York and work. *Lunding v. New York State Tax Appeals Trib.*, *supra*. He had that right; "classification" had zero relevance.

After denial of certiorari, the *Peden* plaintiffs dropped the matter and were dismissed by the trial court. There was no settlement, no mass global preclusive decree, no notice to citizens at large (re any settlement or opt-outs or interventions or res judicata bars or fundamental rights claims). There had been no explicit address in the Kansas Supreme Court of the citizens' mass remedial problem, inflicted by the Kansas administrative claims system, which precludes a judicially ordered mass refund. That court did take the trouble, however, to announce to the public that only 5000 claimants were involved, just a few top bracket folks; so nobody else should get excited. The trial court had certified a class after first refusing, but any statewide group or "class action" tax refunds were actually doomed under *Dean v. Kansas*, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992), and *Zarda v. Kansas*, 250 Kan. 364, 826 P.2d 1365 (Kan. 1992) in the Kansas Supreme Court. All the participants had to know it. Mandamus had also been squelched in *Farmers Banshares of Abilene v. Graves*, 250 Kan. 520, 826 P.2d 1363 (Kan. 1992). The Kansas Supreme Court simply deep-sized all the latent refund problems for Kansas citizens, and Kansas, by reversing on "rational basis" treatment.

3. Such is not germane to the fundamental inherent citizens' "liberty" interest asserted here, under due process. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) struck a rational Louisiana

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The legislature might have wished to encourage marriage and to *discourage* single people. The "punitory" effect of the surtax on citizens who did not wish to marry, or couldn't, went unmentioned, as did *State v. Gowdy, supra.*

As of December 20, 1996, it had not occurred to any of the various *Peden* participants that there is a fundamental liberty interest *inherent in the citizens themselves*, absolute, protected by the Fourteenth Amendment: to be and remain single, which is a corollary of the right to marry. *Cf., Loving v. Virginia*, 388 U.S.1, 12 (1967) (Part II, Warren, C. J.).

Petitioners' experiences of *Peden* are in the Complaint, viz. ¶¶ 7-10, 33-35, 37-40, 47-48. Pet. App. 33a-36a, 48a-50a, 53-54a. This separate suit ensued.

* * *

Petitioners filed their Complaint on April 15, 1999. Pet. App. 27a-55a. They invoked original jurisdiction under 28 U.S.C. § 1343(a)(3), 42 U.S.C. § 1981 *et seq.*, 28 U.S.C. § 1367, and under K.S.A. § 79-3230(d). They asserted that Kansas' own rules of "federal conformity," construed in conjunction with federal tax and remedial "due process" principles, dictated "consent" to such "suit" by Kansas itself under § 79-3230(d). They recited K.S.A. § 79-4301 XI (d) (federal

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tax which could easily have been sustained if the reviewing court made up its mind to forget the First Amendment, and thereupon assumed a state regulation of commercialism in media. In *Truax v. Raich*, 239 U.S. 33 (1915), if the reviewing court forgot "due process" (as well as the Austrian Treaty) and assumed that the be-all and end-all of state government was to protect jobs for native residents, then the alien disemployment law and employment penalties were legal. In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 420, 6 L. Ed. 679 (1827), if Chief Justice Marshall forgot the "no state shall" mandate of Article I, Sec. 10 of the Constitution, then the Maryland import tax was sensible. As Justice Kennedy noted in *Simon & Schuster v. N.Y.S. Crime Victims Bd.*, 502 U.S. 105 (1991) (concurring), if a fundamental right is involved (that's the "first step"), a "compelling state interest" analysis leads nowhere.

court jurisdiction is not foreign or unknown to Kansas), K.S.A. § 79-32,109(a), and Kansas Constitution Article XI § 11 (prescribing "conformity"). They invoked Kansas' own sovereign duty to provide "due process" relief. Complaint, ¶¶ 5, 21, 41, 49. Pet. App. 32a, 44a, 50a-51a, 53a-55a. They raised the important claim that there is an absolute inherent fundamental right to be and remain single, implicit in the liberty interest protected by due process, *free of systematic surtaxes or penalties*. They prayed for reassessment of correct taxes (restituting the penalty element), for all single taxpayers. Complaint ¶¶ 31, 43, 46, 49; Pet. App. 47a, 52a-55a. The "correct" or "saved" tax was depicted in the Complaint, ¶ 20. Pet. App. 43a.

Petitioners separately asked for a declaration that *Peden* was *not* res judicata as to this action. Complaint, Count IV, *passim*, ¶¶ 36, 42. Pet. App. 48a-51a. Petitioners faced the public relations notion that *Peden* completely resolved the whole ten year surtax episode.[4] *Res judicata* is actually an affirmative defense. F.R.C.P. § 8(c). There could

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4. Secular fundamental rights were clearly *dehors Peden*. After the time of Adam and Eve petitioners understand that it was the Catholic Church that evolved a volitional element into the subject of marriage (certainly as to women), and sought to encourage marriages voluntarily contracted in church. Ingram, Martin, *Church Courts, Sex and Marriage in England, 1570-1640*, Cambridge U. Press (New York, 1987), *passim*, and Ch.6. The problem of finding "consent" to marriage (otherwise contracted) bedeviled the English ecclesiastical courts, during and after the Reformation. Helmholz, R. H., *Roman Canon Law in Reformation England*, Cambridge U. Press (New York, 1990), at 1, 6, 69-70, 140, 143, 166 (remarriage). Such predated the generalized Blackstonian articulation of absolute rights, inherent in citizens, via "freewill" and liberty notions. The volitional "liberty interest" claim here is also the volitional religious "free exercise" claim, free of penalty. Both were handled in tandem, correctly, in *Johnson v. United States*, 422 F. Supp. 958, 975 (N.D.Ind. 1976), *aff'd. sub nom. Barter*, 550 F.2d 1239 (7th Cir. 1977), *cert. den.*, 434 U.S. 1012 (1978).

be no preclusive attribute of the *Peden* result,[5] as to this case. Complaint ¶ 36; Pet. App. 49a.

Petitioners also argued that K.S.A. § 79-32,105(b) provides an insufficient fund ($4,000,000, which is clearly not enough) to provide redress to all single taxpayers, which itself deprived them of an adequate remedy at law in the Kansas system (and that such insufficiency also equitably suspended or superceded any otherwise applicable limitations period), citing *Stewart Dry Goods Co. v. Lewis (I)*, 287 U.S. 9 (1932) (where the General Fund of Kentucky seemed to be insolvent). Doc. 17 in the district court. They argued the equitable premise as to suspension of claims limitations periods (at law) found in *County of Lincoln v. Luning*, 133 U.S. 529 (1890). Such supported the "disremediation" claims that petitioners advanced in all of Count IV of the Complaint, and in their jurisdictional statement.[6] Complaint ¶¶ 5-11, 32-42; Pet. App. 32a-37a, 48a-51a. They militate *in favor* of federal equitable jurisdiction (over the officials and Department).

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5. The panel's Order and Judgment wrongly ipse dixits that (1) "this issue" has been litigated by "a class," and that (2) *Peden* proves that some kind of Kansas case could be brought. Pet. App. 6a, 11a. The 10th Circuit thus abstained the inquiries of the right claimed and as to effective redress. *Res judicata* was not in the appeal until Chief Judge Tacha seemed to raise it, sua sponte, at oral argument on January 22, 2001. There is no transcript, but the 10th Circuit has an audio recording. Petitioners were there solely on the Eleventh, per Judge Rogers' dismissal. They responded with a series of oral citations, specifically including *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), and *Richards v. Jefferson County*, 517 U.S. 793 (1996), to the effect that these parties were different and these claims were different. Petitioners asserted they could win *res judicata*, "hands down;" it had been briefed below. Doc. 17 in the district court.

6. In the court of appeals petitioners' disremediation arguments were dismissed by resort to *Peden*, see n.5, *ante*. The panel quoted *Alden v. Maine*, 527 U.S. 706 (1999) (Kennedy, J.), with an ipse dixit that a Kansas remedy therefore *existed*. Pet. App. 6a. *Alden v. Maine*, *supra*, says no more than that *a Kansas remedy ought to exist*. Petitioners were showing *disremediation in fact in this case*. Unfortunately, *Reich v. Collins*, 513 U.S. 106 (1994) and *Alden* do not control what *exists*.

The district court dismissed, on respondents' pre-answer motion (F.R.C.P. § 12(b)), focusing on *Hans v. Louisiana, supra, and divers modern cases not involving the slightest attention to fundamental rights of United States citizens secured by the Constitution.* It found no "support" for plaintiffs' "consent" or "waiver" argument under K.S.A. § 79-3230(d). The scent of money already collected for prior years (even the citizens' own) evoked a notion of past tort conduct. Pet. App. 12a-15a.

IV. The Appeal and the Panel's Opinion

The United States Court of Appeals for the Tenth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291. Review of jurisdiction was *de novo. Hopkins v. Okla. P.E.R.S.*, 150 F.3d 1155 (10th Cir. 1998) (a facial challenge to a forfeiture decreed by an Oklahoma pension statute, based on the Fifth Amendment and Eighth Amendment, needing no more than § 1983).

Petitioners asserted that their ancient right to redress itself was self-executing[7]. As to "equity" and multiplicity, petitioners faced claim by claim "review of administrative action" following which only those Kansans who protested and claimed and pursued two layers of bureaucratic review and then litigated through appellate review, severally, could actually get refunds. There are simply too many afflicted single taxpayers for this to be effective; they cannot afford

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7. As to the same concept, *see Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (Kennedy, J.), Part III (action and voting right "inherent" under the XVth); *Cyprus Amax Coal Co. v. United States*, Georgetown.edu/Fed-Ct/Circuit/fed/op./99-5060 (Fed. Cir. 1999), *cert. den.*, __U.S. __(6-4-2001) (monetary redress for tax, held unconstitutional under the Export Clause, is secured by the Constitution, regardless of administrative claims procedure); *Jackson Co. (Kansas) v. United States*, 100 F.2d 929 (10th Cir. 1939), *mod.*, 308 U.S. 343 (1939) (as to Kansas sovereignty and state disremediation, where void taxes imposed, under the Fifth); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), n.9 (the Fifth is self-executing).

to press "several" claims, case by case.[8] It is indeed different elsewhere, but those state courts cannot remediate these petitioners. *See* text at 13-14, *ante*. The comity and equity-based doctrine of *California v. Grace Brethren Church*, 457 U.S. 393 (1982) doesn't apply here.

Petitioners renewed their consent argument under K.S.A. § 79-3230(d). It is remedial.

* * *

The actual "surtax" or penalty remains depicted, but unexamined, in petitioners' Complaint, ¶¶ 19, 20. Pet. App. 41a-43a. The panel opinion declines to decide the "first question," whether there is a fundamental right to be and remain single. Yet it *ipse dixits* that "this issue" has already been litigated. Pet. App. 6a, 11a. It declines to address actual remedies available in Kansas, but declares that a "forum" exists. Pet. App. 11a. It ignores the matter of what remedies citizens are actually awarded. There is an important conflict between

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8. If this court will first read *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) and *California v. Grace Brethren Church*, 457 U.S. 393 (1982), and evaluate what was done later in the three Kansas cases cited at n.2, *ante*, it will see that the Kansas Supreme Court took comity to mean that a federal court would be looking the other way. It dismissed the masses of its own citizens, who had not each sought "review of administrative action." This, where three systematic statewide administrative mulcts were the actual problem at hand. If the federal courts wouldn't look, neither would the Kansas Supreme Court. That is a "clear statement." The court refused to rule the merits in each case, and defied the assumptions which premise the two earlier comity and 28 U.S.C. § 1341 cases from this court. Each dumb automobile owner in Kansas should have filed and pursued his own administrative claim for money back. *Dean, supra*; *Zarda, supra*. Same for the shell holding companies. *Farmers Banshares of Abilene, supra*. Otherwise, tough luck; Kansas keeps the money. The masses are not "before the court." Kansans do not get mass equitable redress. The pivotal assumption in *California v. Grace Brethren Church, supra*, that state courts and officials would dispense relief under California doctrine, is absolutely unjustified here. This is the spectre come true, of manipulation of rights and jurisdiction by state officials and courts. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

this methodology and the Third Circuit's principled analysis, which led to citizen remedies, in *Garrett v. Bamford*, 538 F.2d 63 (3d Cir. 1976), *cert. den.*, 429 U.S. 977 (1976).

Petitioners can self-execute their fundamental right to be and remain single. *They argued that the distinct right to redress for a void penalty on fundamental rights is self-executing, needing no more than § 1981 and § 1983.* Redress would thus be there. *See* n.7, *ante. Buchwald v. U. N. M. Sch. of Med.*, 159 F.3d 487 (10th Cir. 1998), clearly held with other Circuits including the Second: "*The existence of a past harm does not convert a prospective injunction into retrospective relief barred under the Eleventh Amendment.*" [emphasis supplied]. 159 F.3d at 495, and nn. 5-6. This panel declaimed that it had ". . . previously applied . . . Eleventh Amendment analysis in cases involving fundamental rights." Pet. App. 5a-6a. Next, the panel ipse dixit conflated an order for future reassessment (and return of the "penalties") with a notionally retrospective inculpation at law for tort-based ". . . money damages for past wrongs." Pet. App. 7a-8a, 10a-11a. The term "federal court" is not found in K.S.A. § 79-3230(d). Pet. App. 8a-9a. That is all there was to that.

REASONS FOR GRANTING THE WRIT

I. The Important Problem is a Generalized Conflation of the Requested Equitable Orders for Future Redress with Retrospective State Inculpation for Conduct-Based Damages at Law.

This Court should reaffirm a jurisprudence which applies a diagnostic method and equitable relief specific to the rights and defendants at hand. Dean Jeffries is on to the important problem, which is the infection of civil rights questions with tort-based attitudes. A void state statutory levy here has become a barred Eleventh Amendment damages case, and thus a sovereign *fait accompli*. This is a perversion of *Monroe v. Pape*, *supra*, and deserves review, for its own sake. The citizens claim restitution but the panel saw only "damages."

The Angelic Doctor over 700 years ago advised the Duchess of Brabant that she should give tax money back to her subjects

if her ministers ("officiales") had taken it from them beyond the provision of the law, *regardless of who happened to have custody of the money at the time*. The words are "restituere" and "restitutionem." Thomas Aquinas, *Selected Political Writings*, *De Regimine Judaeorum*, Ed. A. P. D'Entrèves (Oxford), Basil Blackwell (Oxford, 1954), latin at 92, 94, english at 93,95. This panel found no "sovereign duty," and applied "sovereign immunity." Pet. App. 5a. *Hans* never said that much. The equity jurisdiction of federal courts, by implication from the panel, is crimped into matters of proclamations against future state "behavior." This Court has never held that. *Cf.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

II. A Revisitation of the Doctrine of "Hostile State Invasion" of Citizens' Fundamental Rights, to Distinguish Such Matters from Recent "Federalism" Decisions Involving Congressionally Created Rights and Actions, is Timely.

"Hostile state invasion" is rare; it's also different. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S.__ (February 21, 2001) (Kennedy, O'Connor, J.J.). Chief Justice Rehnquist said in Part II of *Garrett*: "The first step . . . is to identify with some precision the scope of the constitutional right at issue." Slip op., 7. No Justice disagreed. If there is any "absolute" fundamental right, it has to be autonomous and exercised citizen by citizen, to be and remain single. *Sosna v. Iowa*, 419 U.S. 393 (1975) ("voluntary adjustment"); *Sowders v. Okla. Tax Comm.*, 552 P.2d 698, 700-702 (Okla. 1976) (where the statute was valid, but the "great thoughts" relevant here are collected).

The open question is state usurpation, in the context of inadequate state redress, where a fundamental right has been penalized. Cases like *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (see Part IV A), have not foreclosed ". . . additional meaningful debate . . ." as to organic "inherent limitations" on sovereign immunity, where citizens assert their own inherent rights and a due process right to redress.

Troxel v. Granville, 530 U.S. 57 (2000), raised only relative rights of grandparents (*vis à vis* others), not matters of absolute

freewill. Here, the asserted fundamental right of United States citizens to be and remain single is a Cartesian corollary of the well established fundamental right to marry. Blackstonian "freewill" (liberty) is indeed a first premise of any right to marry anyone. *But it needs to be restated here.* Likewise, ". . . a corollary of the right to associate is the right not to associate." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (June 26, 2000) (Scalia, J.). So too, freedom of speech entails ". . . a concomitant freedom *not* to speak publicly . . . [serving] . . . the same ultimate end as freedom of speech in its affirmative aspect." *Bartnicki v. Vopper*, 532 U.S. __ (May 21, 2001) (Stevens, J., quoting), at n. 20, slip op. at 17. *See also, Loving v. Virginia, supra,* 388 U.S. at 12.

Petitioners' "self-executing" due process right to taxpayer redress is rooted in common law and constitutional practice. That practice, logically or not, never implicated the personal immunity of the King. If Justice Iredell thought the King, *solus*, could not be sued in assumpsit he was literally correct. He gave no list of all the accoutrements of citizenship or sovereignty, nor did he explain just what "Georgia" really was,[9] in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440 (1793). He did not forestall the adoption of the Fourteenth Amendment, which changed ideas about what "states" could do, *and not do.*

Officials were never the King: ". . . the English have a genius for illogical mitigation; and the history of ministerial responsibility enshrines not the least splendid contribution [they] have made to the

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9. Justice Iredell made no analysis of fundamental taxpayer access to judicial remedies, equitably running against the King, *solus*, or against his officers, or private tax collectors, or against any *persona designata* standing in for the entire "body politic." The Court of Exchequer seems to have addressed the subjects' equity problem as early as 1668, on the assumption that the new King (Charles II) wanted justice to be done to his subjects. Goldsworthy, Jeffrey, *The Sovereignty of Parliament*, Oxford U. Press (Oxford, 1999), at 84. The personal debt problems of British kings were off-loaded to Parliament and the Bank of England starting in 1694. Dickson, P.G.M., *The Financial Revolution in England*, MacMillan (New York, 1967), *passim.*

theory of representative government." Laski, Harold, *Responsibility of the State in England*, 32 Harv. L. Rev. 447 (1919), at 449. Illogical mitigation is the only answer to Justice McReynolds' otherwise sensible dissent in *Truax v. Raich*, 239 U.S. at 43-44. To citizens, mitigation counts.

This Court should restate the important mitigation principle, for all the federal courts. It can explain, in an "alienation" context, what Justice Miller meant in *Savings & Loan Assn. v. Topeka*, *supra*. Kansas has no power to tax B into marrying D. "No court" should hesitate to strike such a law. Kansas is indestructible, but it can attempt void acts of usurpation. *Grosjean v. American Press Co.*, *supra*; *Texas v. White*, 74 U.S. (7 Wall) 700 (1869) (both opinions). Federalist, No. 32; No. 81 (re "alienation").

III. This Court Should Address the Proposition That Penalties on Fundamental Rights "Secured by the Constitution" Require No Congressional Abrogation of State "Immunity," Beyond 42 U.S.C. § 1983, for Equitable Redress.

"At first," *Board of Trustees of the University of Alabama v. Garrett*, *supra*, would dictate an examination of the personal right in question, in context of the liberty interest found in the Fourteenth, and notation of the facial "penalty" challenge to a state law. After a *state* gets the money, the panel held that the Eleventh kicks in, preclusively. The "damages" simile precludes redress. Possession becomes more than 9/10 of *any* state law, void or otherwise. By the hand of "sane Congresses," 42 U.S.C. § 1981(a) (last phrase) addresses ". . . penalties, taxes, licenses, and exactions of every kind . . . ," and § 1981(c) harmoniously protects personal rights impaired "under color of state law." The panel's approach conflicts, yet the § 1983 "suit in equity" accomplishes no more, substantively, than "securing" ancient common law taxpayer rights. In *Crawford-El*, *supra*, the dissenters were talking tort-infection. They were on the mark, here, as was Justice Frankfurter in *Monroe v. Pape*, *supra*.

IV. This Court Should Address the Important Jurisdictional Question of Whether the Repeal of a Challenged State Statute Defeases a Federal Court, if Preceding Unconstitutional Harm Remains Unremediated.

The panel's approach (to the "repealed" laws) precludes the question of whether there was ever a valid levying statute, for 1988-1997. Here, ministerial assessments of valid Kansas income taxes for those years have yet to occur, for single persons. The result below can only excuse statutory due process or "takings" violations, under tort theory. If it can forfend practical redress in its own courts, a state can keep any money thus garnered, and repeal the law only when the citizens awake. This is importantly inconsistent with *Hillsborough v. Cromwell*, 326 U.S. 620 (1945) (extolling a "bill in equity").

Giant governmental mistakes, as seen in *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998), will go unremediated, if the panel is correct. Thus, a federal court could order that a Kansas official government sign (viz., mandating polygamous Mormonism) be taken down, but could not restitute an already collected (but "repealed") legislative surtax on non-juring Baptists.

V. Here, as to "Clear Statements" by the States, the Court Should Continue the Educational and "Constructional" Work Begun in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe.*

Recent "federalism" cases have extolled the clear statement rule; but those cases have involved "damages," or other federal usurpations of state sovereignty, based on federal statutory "rights" which didn't exist otherwise. Here, this Court can construe K.S.A. § 79-3230(d), not merely tracing for the words "federal court," but so as to implement a real world recognition of Kansas' own sovereign duty of actually affording effective redress. Otherwise, the "suit in equity" always granted in 42 U.S.C. § 1983 as well as the tandem "suit" once contemplated in K.S.A. § 79-3230(d) are subject to occlusion of state judicial redress committed in the name of "administration." The important question is whether the "renvoi" with a remedial (but ambiguous) state statute

should be to the Fourteenth Amendment, or the Eleventh Amendment. The panel looked to the Eleventh. Pet. App. 8a-9a.

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. __ (April 30, 2001), implies otherwise. K.S.A. § 79-3230(d) is remedial, for citizens, and bespeaks their rights, not Kansas prerogatives. There are no magic statutory words, to say or not say, where the principle is to vindicate the constitution. State disremediation implicates the Fifth. *Cf.*, *Cary v. Curtis*, *supra* (Story, J. and McLean, J.). *I.N.S. v. St. Cyr.*, 533 U.S.__ (June 25, 2001), further indicates the problem, where petitioners have no other forum. *See also, Calcano-Martinez v. I.N.S.*, 533 U.S. __ (June 25, 2001) (Stevens, J.). Justice Frankfurter maintained in *Great Northern Life Ins. Co. v. Read*, *supra*, that no "ritualistic formula" was necessary for waiver. Justice White indicated the same in his note (*) in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 519 (1982).

Judge Wisdom addressed a murky background, and construed ambiguous statutory language in *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. den.*, 390 U.S. 1015 (1968), on the (tacit) supposition that Louisiana could not disremediate its corporate citizens and keep an extra-territorial tax. Notwithstanding later Louisiana constitutional amendments. Without lots of words, but in the real world. The important tension here (versus Justices Story, McLean, Frankfurter, White, and Judge Wisdom) is that the panel's "construction" of § 3230(d) means that Kansas keeps every dime.[10] This is not what the Angelic Doctor said. Kansas makes only a "clear statement" of remedial multiplicity.

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10. Such is not the constitutional or constructional "equity of the statute." It is remedial and not an instrument of fiscal manipulation. *See* Landis, James M., *Statutes and the Sources of Law. Harvard Legal Essays*, reprinted by Books for Libraries Press (Freeport, 1967), pp. 213 *et seq.*

CONCLUSION

The "first step" Questions Presented, as to the "fundamental right to be and remain single," and the related matter of a fundamental remedial right to redress, are of unusual substantive "importance" to United States citizens. *The further Questions Presented are of elemental structural importance to the jurisdictional capacities of the federal courts,* in cases of "hostile state invasion." That doctrine was never tort-infected and neither was 42 U.S.C. § 1983. *Monroe v. Pape, supra,* notwithstanding. The "clear statement rule" of state waiver should be restated on "real world" constitutional and constructional footings, for both individual citizens and the states. Petitioners pray that the writ be granted.

Respectfully submitted,

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October 10, 2001

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED APRIL 3, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-3078
(D. Ct. No. 99-CV-4056-RDR)
(D. Kan.)

CAROLYN ANN LAFAVRE, also known as Carolyn A. Howerter, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers who reside in Kansas,

Plaintiffs – Appellants,

v.

STATE OF KANSAS, c/o Carla J. Stovall, Office of the Attorney General Kansas; KANSAS DEPARTMENT OF REVENUE, STATE OF KANSAS, c/o Carla J. Stovall, Office of the Attorney General of Kansas; TIM SHALLENBURGER, as State Treasurer of Kansas; STEPHEN S. RICHARDS, as Secretary of Kansas Department of Revenue and as acting Director of Kansas Division of Taxation; DAVID J. HEINEMANN, as agent and designee of Secretary of Revenue, and of Director and Division of Taxation of Kansas Department of Revenue, and as representative defendant of a class of employees and agents of Kansas and the Kansas Department of Revenue,

Defendants – Appellees.

Appendix A

ORDER AND JUDGMENT*

Before **TACHA**, Chief Judge, **SEYMOUR**, and **BRORBY**, Circuit Judges.

The plaintiffs, a class of single taxpayers residing in the state of Kansas, appeal the district court's dismissal for lack of subject matter jurisdiction. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background

In 1999, the plaintiffs LaFavre and Merritt filed a complaint on behalf of unmarried individuals who paid Kansas state income tax between 1988 and 1997. They alleged that K.S.A § 79-32,110, as it then existed, was unconstitutional because it imposed lower rates on married individuals filing joint returns than on other taxpayers. Pursuant to 42 U.S.C. §§ 1981 and 1983, they sought reassessment of Kansas income taxes paid by single persons between 1988 and 1997, and refunds of any excess amounts paid.

On February 18, 2000, the district court dismissed the plaintiffs' action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The district court held that the Eleventh Amendment of the United States Constitution

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

barred its consideration of the plaintiffs' complaint. Because the named defendants were the State of Kansas, the Kansas Department of Revenue, the State Treasurer, the Secretary of Revenue, the Director of Taxation, and agents of the Secretary of Revenue, and because it found that the plaintiffs sought retroactive relief in the form of a reassessment and tax refunds, the district court concluded that the Eleventh Amendment prevented it from exercising jurisdiction.

II. Discussion

We review de novo both a district court's dismissal for lack of subject matter jurisdiction and its determination that a suit is barred by the Eleventh Amendment. *U.S. West, Inc. v. Tristani*, 182 F.3d 1202, 1206 (10th Cir. 1999) (Rule 12(b)(1) dismissal); *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir. 1995) (Eleventh Amendment determination).

The Eleventh Amendment applies both to diversity jurisdiction and to federal question jurisdiction. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997). "[O]nce effectively asserted [Eleventh Amendment] immunity constitutes a bar to the exercise of federal subject matter jurisdiction." *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000) (original emphasis omitted). It is undisputed that the defendants asserted Eleventh Amendment immunity before the district court in their motion to dismiss. Therefore, if we find that Eleventh Amendment immunity applies to the defendants, we must affirm the district court's dismissal for lack of subject matter jurisdiction.

Appendix A

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. While its plain language does not apply to suits in federal court brought by a citizen against a citizen's own state, the Supreme Court "has long 'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.' " *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (alteration in original) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996)). This presupposition is that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999); *see also id.* at 712-30 (recounting the history of state sovereignty and the impact of the Constitution and the Eleventh Amendment on that sovereignty). The Supreme Court recognized over one century ago that this immunity extends to suits brought by citizens against their own states. *Hans v. Louisiana*, 134 U.S. 1, 13-16 (1890).

The plaintiffs argue that the immunity recognized in *Hans* is outdated and no longer valid. We disagree. Both the Supreme Court and this court have repeatedly confirmed the continued validity of the immunity recognized in *Hans*. *See, e.g.*, *Kimel*, 528 U.S. at 79 (noting the "validity and natural import of decisions like *Hans*"); *Alden*, 527 U.S. at

712-30; *Coeur d'Alene Tribe*, 521 U.S. at 267-68; *ANR Pipeline Co. v. Lefaver*, 150 F.3d 1178, 1187 (10th Cir. 1998); *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1420 (10th Cir. 1997); *Powder River Basin Res. Council*, 54 F.3d at 1483. It is clear to this court that Eleventh Amendment immunity extends to suits brought by citizens against their own state.

The plaintiffs cite the Angelic Doctor to support their argument that, in cases such as this, a "sovereign duty" exists which renders Eleventh Amendment immunity inapplicable. However, the plaintiffs have not cited, nor have we discovered, any relevant authority supporting a "sovereign duty" exception to Eleventh Amendment immunity. Such an exception would not comport with the rationale underlying sovereign immunity. Alexander Hamilton noted this more than two centuries ago when he argued that states could not be sued in federal court — even to force a state to fulfill its duty to comply with its own contractual obligations — without the state's consent. The Federalist No. 81, *cited in Alden*, 527 U.S. at 716. We therefore decline to create a "sovereign duty" exception to Eleventh Amendment immunity.

The plaintiffs further argue that they have a fundamental right to remain single and that this right, if any, has been violated. They argue that traditional Eleventh Amendment analysis is inapplicable in a case involving a fundamental right because such rights are self-executing. We disagree. The plaintiffs cite no relevant authority to support this argument. Indeed, even if the plaintiffs do have a fundamental right to remain single, an issue we do not address, we have previously applied our Eleventh Amendment analysis in cases involving

fundamental rights. *See, e.g., Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 494-95 (10th Cir. 1998) (fundamental right to travel).

The plaintiffs argue that to apply Eleventh Amendment analysis in a case involving a fundamental right would result in their being "disremediated." We disagree. When a federal court is barred from hearing a case, the state can provide a competent forum for a party to challenge any violation of fundamental rights. As the Supreme Court has stated:

> The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Alden, 527 U.S. at 755 (alteration in original) (quoting U.S. Const. Art. VI). Indeed, a class of unmarried Kansas taxpayers has already litigated this issue in the Kansas state courts. *See Peden v. State*, 930 P.2d 1 (Kan. 1996), *cert. denied*, 520 U.S. 1229 (1997). We therefore find the plaintiffs' "disremediation" argument to be without merit.

The defendant State of Kansas clearly qualifies for Eleventh Amendment immunity. The defendant Kansas Department of Revenue, as an arm of the state, also qualifies for immunity. *See Sturdevant v. Paulsen*, 218 F.3d 1160,

1164 (10th Cir. 2000) (noting that governmental entities that function as an arm of the state qualify for Eleventh Amendment immunity). The remaining defendants are state officials. As the Supreme Court has noted, "[t]he Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (internal quotation marks omitted). The determination as to whether the state is the real party in interest depends on the type of relief sought. "Suits that seek prospective relief are deemed to be suits against the official, while suits that seek retroactive relief are deemed to be suits against the state." *ANR Pipeline Co.*, 150 F.3d at 1188. Furthermore, if the relief sought is to be money damages paid by the state, then the state is the real party in interest. *Pennhurst*, 465 U.S. at 101 n.11.

The plaintiffs argue that the relief they seek is prospective relief. They argue that they do not seek "damages." Rather, they denominate the relief they seek as "reassessment," "restitution," "assumpsit," and "disgorgement." Regardless of the terms the plaintiffs wish to apply, the relief they seek is the return of money they claim was unconstitutionally collected as income tax between 1988 and 1997. Thus, they seek money damages from the state for past alleged wrongs. Furthermore, the provision of the Kansas tax code which the plaintiffs allege was unconstitutional has been amended. The disparity between the rates assessed to married taxpayers filing jointly and other taxpayers was eliminated as of the 1998 tax year. *See* K.S.A. § 79-32,110(a) (Supp. 2000). Thus, any decision regarding the tax provision in force between 1988 and 1997 can have no prospective application. We therefore find that the relief sought by the plaintiffs is retrospective. We also find that the return of money paid as income tax is money

damages collected from the state itself. Therefore, we find that this action was brought against the remaining defendants in their official capacities, that the State of Kansas is the real party in interest, and that these defendants qualify for Eleventh Amendment immunity.

We conclude that Eleventh Amendment immunity, unless abrogated, is applicable to all defendants. We now consider whether this immunity has been abrogated. It is well settled that a state may waive its immunity under the Eleventh Amendment, but we will find waiver only where a state's consent to be sued in federal court is "express and unequivocal." *V-1 Oil Co.*, 131 F.3d at 1421. While it may be true that this court may imply a waiver of Eleventh Amendment immunity from a state statute or constitutional provision, we will imply such a waiver "only where stated by the most express language or by such overwhelming implication . . . as will leave no room for any other reasonable construction." *Id.* (alterations and internal quotations omitted).

The plaintiffs have failed to identify any waiver meeting the stringent standard of "express and unequivocal." Indeed, the plaintiffs concede in their brief that "Kansas emits no 'clear statement' " in the Kansas income tax code consenting to suit in federal court. Appellant's Br. at 29. The plaintiffs argue, however, that K.S.A. § 79-3230(d),[1] when read

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1. K.S.A § 79-3230(d) provides:

> In case a taxpayer has made claim for a refund, the taxpayer shall have the right to commence a suit for the recovery of the refund at the expiration of six months after the filing of the claim for refund, if no action has been taken by the director of taxation.

together with the Kansas Constitution and the United States Constitution, amounts to a consent by Kansas to suit by taxpayers in federal court. We disagree. A reasonable construction of this provision is that the State of Kansas has consented to taxpayer suits in its own courts. Furthermore, the Supreme Court has made clear that a state's consent to be sued is not express and unequivocal consent to be sued *in federal court. College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Nor does it consent to suit in federal court merely by stating its *intention to 'sue and be sued,'* or even by authorizing suits against it 'in any court of competent jurisdiction.' " (citations omitted) (emphasis added)); *see also Pennhurst*, 465 U.S. at 99 n.9 ("[T]he Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts."). We find no express and unequivocal indication that the State of Kansas has consented to be sued by taxpayers in federal court.

In addition to waiver by the state, Eleventh Amendment immunity may be abrogated by Congress, primarily by acting under § 5 of the Fourteenth Amendment. *ANR Pipeline Co.*, 150 F.3d at 1188. To find such an abrogation, we must find "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States." *Pennhurst*, 465 U.S. at 99 (internal quotation marks omitted); *see also ANR Pipeline Co.*, 150 F.3d at 1188 (requiring the "clearest and most unmistakable terms" for congressional abrogation of a state's Eleventh Amendment immunity).

It is well settled that neither 42 U.S.C. § 1981 nor § 1983 abrogate the Eleventh Amendment immunity of the states. *E.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67 (1989) (§ 1983); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998) (§§ 1981, 1983, and 1985). Thus, Congress has not abrogated the defendants' Eleventh Amendment immunity under these provisions.

Finally, the plaintiffs argue that the doctrine established in *Ex Parte Young*, 209 U.S. 123 (1908), permits them to maintain this action notwithstanding the Eleventh Amendment. Under *Ex Parte Young*, "when a party seeks only prospective equitable relief — as opposed to any form of money damages or other legal relief — then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States." *ANR Pipeline Co.*, 150 F.3d at 1188. However, *Ex Parte Young* "will not go so far as to allow federal jurisdiction over a suit that seeks to redress past wrongs — only ongoing violations are covered." *Id.* at 1189. Furthermore, *Ex Parte Young* "does not allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable." *Id.*

As we have discussed above, we find that the relief sought by the plaintiffs is retrospective and amounts to monetary damages for alleged past wrongs. We also find that, because the Kansas tax code provision has been amended and was not in force at the time of the plaintiffs' 1999 complaint, any relief addressed to the provision itself is retrospective. We find, therefore, that the *Ex Parte Young* exception for prospective equitable relief is inapplicable in this case.

Ex Parte Young has also been applied where no state forum is available to vindicate federal interests. *Coeur d'Alene Tribe*, 521 U.S. at 270-71. We have already noted, however, that not only did a state forum exist, but a class of unmarried Kansas taxpayers already litigated this issue in the Kansas state courts. *See Peden v. State*, 930 P.2d 1 (Kan. 1996). We therefore find no basis for applying *Ex Parte Young* to this case.

III. Conclusion

We find that the Eleventh Amendment bars the plaintiffs' action. Consequently, we find that the district court lacked subject matter jurisdiction to adjudicate plaintiffs' claims. Because we find that the Eleventh Amendment required dismissal of the plaintiffs' claims, we need not consider the plaintiffs' argument that there is a fundamental constitutional right to remain single. *See Griffin v. Davies*, 929 F.2d 550, 554 (10th Cir. 1991) ("We will not undertake to decide issues that do not affect the outcome of a dispute.").

Accordingly, we AFFIRM the district court's dismissal.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Chief Judge

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND FILED FEBRUARY 18, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 99-4056-RDR

CAROLYN A. HOWERTER, et al.,

Plaintiffs,

vs.

STATE OF KANSAS, et al.,

Defendants.

MEMORANDUM AND ORDER

This is an action brought by the plaintiffs on behalf of a class of single Kansas income taxpayers, pursuant to 42 U.S.C. §§ 1981 and 1983. The named defendants are the State of Kansas; Kansas Department of Revenue; Tim Shallenburger, Treasurer for the State of Kansas; Karla Pierce, Secretary of Revenue of the Kansas Department of Revenue and acting Director of the Division of Taxation of the Kansas Department of Revenue; and Douglas A. Hager, agent and designee of the Secretary of Revenue and the Director of the Division of Taxation.[1] Plaintiffs contend that

1. The complaint does not specifically indicate whether the individual defendants are sued in their official or individual (Cont'd)

Appendix B

K.S.A. 79,110(a), a statute in effect from 1988 through 1997 that imposed higher Kansas income tax rates for single persons, is unconstitutional. They seek declaratory relief and monetary relief in the form of tax refunds. This matter is presently before the court upon defendants' motion to dismiss.

In the motion, the defendants seek dismissal on a variety of grounds. The defendants raise a number of arguments including the contention that the court lacks jurisdiction to consider plaintiffs' claims based upon (1) the Eleventh Amendment to the United States Constitution; (2) the Tax Injunction Act, 28 U.S.C. § 1341; and (3) federal comity principles.

The court need only consider the first argument raised by the defendants. There is no question that the Eleventh Amendment bars the instant lawsuit. The court shall provide a brief basis for this decision.

The Eleventh Amendment provides as follows: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." It is well-settled that this bar to suits against states in federal courts applies not only to actions brought by citizens of

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(Cont'd)
capacities. Nevertheless, the nature of the claims asserted and the arguments made by the plaintiffs suggest that they are sued only in their official capacities. *See Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993).

another state, but also to those brought by citizens of the state involved. *See Hans v. Louisiana*, 134 U.S. 1, 10 (1890). The Eleventh Amendment confirms that each state is a sovereign entity and that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans*, 134 U.S. at 13). Accordingly, the Supreme Court has long held that "[t]his express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co. v. Dept. Of Treasury of Indiana*, 323 U.S. 459, 464 (1945). The Eleventh Amendment bars suits for damages in federal court against a state or its agencies or its officials. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984). It precludes suits in law or in equity. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 530 (1982).

Plaintiffs suggest that the law on Eleventh Amendment is changing to allow suits such as this one. We disagree. The court finds no chink in the armor of the Eleventh Amendment. Recent decisions by the Supreme Court demonstrate its continuing vitality. *See Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000); *Alden v. Maine*, 527 U.S. 706 (1999).

Plaintiffs have also suggested, for several reasons, that the State of Kansas has consented to suit here. Plaintiffs, however, have failed to offer any substantial legal support for their arguments. The court finds nothing demonstrating that the State of Kansas has consented to be sued in federal court for the type of claims made by plaintiffs.

Finally, plaintiffs have suggested that the application of *Ex Parte Young*, 209 U.S. 211 (1908) allows the court to proceed here. We disagree. In *Ex Parte Young*, the Supreme Court held that prospective injunctive relief against state officials could be pursued in federal court for a continuing violation of federal law. *Ex Parte Young* is not applicable here because plaintiffs seek no prospective equitable relief. They seek only retroactive relief in the form of reassessments for past years, tax refunds and other damages. Federal courts may not invoke *Ex Parte Young* to consider claims for retrospective relief or claims that seek an adjudication of the legality of past state conduct. *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1191 (10th Cir.), *cert denied*, 119 S.Ct. 904 (1999).

Having found that the Eleventh Amendment is a bar to the instant action, the court finds it unnecessary to consider the other arguments of the defendants. The court shall dismiss this action for lack of subject matter jurisdiction.

IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. # 10) be hereby granted. This action is hereby dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated this 18th day of February, 2000 at Topeka, Kansas.

s/ Richard D. Rogers
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 14, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-3078

CAROLYN ANN LAFAVRE, also known as Carolyn A. Howerter, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers who reside in Kansas,

Plaintiffs – Appellants,

v.

STATE OF KANSAS, c/o Carla J. Stovall, Office of the Attorney General Kansas; KANSAS DEPARTMENT OF REVENUE, STATE OF KANSAS, c/o Carla J. Stovall, Office of the Attorney General of Kansas; TIM SHALLENBURGER, as State Treasurer of Kansas; STEPHEN S. RICHARDS, as Secretary of Kansas Department of Revenue and as acting Director of Kansas Division of Taxation; DAVID J. HEINEMANN, as agent and designee of Secretary of Revenue, and of Director and Division of Taxation of Kansas Department of Revenue, and as representative defendant of a class of employees and agents of Kansas and the Kansas Department of Revenue,

Defendants – Appellees.

Appendix C

ORDER

Filed May 14, 2001

Before **TACHA**, Chief Judge, **SEYMOUR**, and **BRORBY**, Circuit Judges.

Appellants' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: [illegible]
Deputy Clerk

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

28 U.S.C. § 1343(a)(3)

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *

Appendix D

Civil Rights Act, 42 U.S.C. § 1981(a) and (c)

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

* * *

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law. [added in 1991]

* * *

Civil Rights Act, 42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

K.S.A. § 79-3230(d)

79-3230. Periods of limitation; extension agreements; notice of agreement with internal revenue service.

* * *

(d) In case a taxpayer has made claim for a refund, the taxpayer shall have the right to commence a suit for the recovery of the refund at the expiration of six months after the filing of the claim for refund, if no action has been taken by the director of taxation.

* * *

K.S.A. § 79-32,105(a)-(c)

Sec. 79-32,105. Same; refunds; distribution of tax. — (a) The director shall pay to the treasurer of the state daily the entire amount collected during the preceding day, under the provisions of this act and from the income tax imposed upon individuals, corporations, estates or trusts pursuant to the "Kansas income tax act" less amounts withheld as provided in subsection (b) . . . which amounts shall be credited to the state general fund.

* * *

Appendix D

(b) A revolving fund, designated as "income tax refund fund" not to exceed $4,000,000 shall be set apart and maintained by the director from income tax collections, withholding tax collections, and estimated tax collections and held by the state treasurer for prompt payment of all income tax refunds and for the payment of interest as provided in subsection (e). The fund shall be in such amount, within the limit set by this section, as the director determines is necessary to meet current refunding requirements under this act.

* * *

(c) If the director discovers from the examination of the return, or upon claim duly filed by the taxpayer or upon final judgment of the court that the income tax, withholding tax, declaration of estimated tax or any penalty or interest paid by or credited to any taxpayer is in excess of the amount legally due, the director shall certify to the director of accounts and reports the name of the taxpayer, the amount of refund and such other information as the director may require. Upon receipt of such certification the director of accounts and reports shall issue a warrant on the state treasurer for the payment to the taxpayer out of the fund provided in subsection (b), except that no refund shall be made for a sum less than $5, but such amount may be claimed by the taxpayer as a credit against the taxpayer's tax liability in the taxpayer's next succeeding taxable year.

* * *

Appendix D

K.S.A. § 79-32,110 (L. 1988, ch. 38, § 2)

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $35,000	4.05% of Kansas taxable income
Over $35,000	$1,418 plus 5.3% of excess over $35,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $27,500	4.8% of Kansas taxable income
Over $27,500	$1,320 plus 6.1% of excess over $27,500

* * *

K.S.A. § 79-32,110 (L. 1989)

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

Appendix D

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $35,000=.....	3.65% of Kansas taxable income
Over $35,000=.....	$1,278 plus 5.15% of excess over $35,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $27,500=.....	4.5% of Kansas taxable income
Over $27,500=.....	$1,238 plus 5.95% of excess over $27,500

* * *

K.S.A. § 79-32,110 (L. 1992, ch. 280, § 55)

On July 1, 1992, K.S.A. 79-32,110 is hereby amended to read as follows: 79-32,110. (a) Resident Individuals. Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

Appendix D

(1) Married individuals filing joint returns.

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) All other individuals.

If the taxable income is:	The tax is:
Not over $20,000	4.4% of Kansas taxable income
Over $20,000 but not over $30,000	$880 plus 7.5% of excess over $20,000
Over $30,000	$1,630 plus 7.75% of excess over $30,000

* * *

K.S.A. § 79-32,110 (1996 Supp.)

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

Appendix D

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All other individuals*

If the taxable income is:	The tax is:
Not over $20,000	4.4% of Kansas taxable income
Over $20,000 but not over $30,000	$880 plus 7.5% of excess over $20,000
Over $30,000	$1,630 plus 7.75% of excess over $30,000

* * *

K.S.A. § 79-32,110 (L. 1997, ch. 41, § 13)

1997 Session Laws of Kansas, Ch. 41, § 13 (signed by the Governor on April 4, 1997):

Sec. 13. On July 1, 1997, K.S.A. 1996 Supp. 79-32,110 shall be and is hereby amended to read as follows: 79-32,110. (a) *Resident Individuals*. Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable

Appendix D

income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All other individuals.*

(A) *For tax year 1997:*

If the taxable income is:	The tax is:
Not over $20,000	*4.1%* of Kansas taxable income
Over $20,000 but not over $30,000	*$820* plus 7.5% of excess over $20,000
Over $30,000	*$1,570* plus 7.75% of excess over $30,000

* * * *

APPENDIX E -- CLASS ACTION COMPLAINT DATED AND FILED APRIL 15, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civ. No. 99-4056-RDR

CAROLYN A. HOWERTER, and
JAMES SCOTT MERRITT, JR.,
on behalf of themselves and all single Kansas
income tax payers who reside in Kansas,

Plaintiffs,

V.

STATE OF KANSAS,
(c/o Carla J. Stovall,
office of the
Attorney General of Kansas
301 S.W. 10th Street
Topeka, Kansas 66612)

KANSAS DEPARTMENT OF REVENUE,
a Kansas Agency
(c/o Carla J. Stovall,
office of the
Attorney General of Kansas
301 S.W. 10th Street
Topeka, Kansas 66612),

TIM SHALLENBURGER,
as State Treasurer of Kansas
900 S.W. Jackson
Suite 201 North
Topeka, Kansas 66612

Appendix E

KARLA PIERCE,
as Secretary of Revenue of the Kansas
Department of Revenue,

KARLA PIERCE,
as acting Director of Division of Taxation
of the Kansas Department of Revenue,

DOUGLAS A. HAGER,
as agent and designee of Secretary of Revenue, and of
Director and Division of Taxation of Kansas Department
of Revenue, and as representative defendant of a class
of employees and agents of Kansas and the
Kansas Department of Revenue,

Defendants.

CLASS ACTION
COMPLAINT

1. Plaintiffs herein were residents of Kansas and were single during some or all the taxable years at issue (1988-1997). Plaintiffs each were born single. Plaintiffs believe that they exist as single persons by virtue of no special act, grace, license, sufferance, or classification or consent of the State of Kansas or the other defendants. Some plaintiffs were born in Kansas, some were born elsewhere in the United States; they believe, severally, that they were born under the fundamental biological laws and processes of nature, by acts of their respective parents, and in most cases, by divine sanction. All plaintiffs prosecuting this suit are citizens of Kansas and the United States under the

Appendix E

XIVth Amendment to the United States Constitution. Plaintiffs derive Kansas taxable income, from the same sources as married persons, by various ways and means, but (as is true with married persons) through the direct or indirect employment of their labor or their capital, or otherwise.

To save this court's time, plaintiffs herein aver, concede, and stipulate that the institution of religious and civil marriage between man and woman is a good thing. Plaintiffs do not complain hereafter that such marriage is bad. The goodness of marriage does not resolve plaintiffs' federal and Kansas constitutional claims, raised herein, which involve the invalidation of separate, systematically excessive, discriminatory, constitutionally burdensome, and void levies and penalties and exactions (cast in the form of statutory "income taxation") against single persons, by Kansas. Plaintiffs' deprivations are compounded by attendant federal due process violations by all defendants, committed in aid of the continued exaction, collection and retention of such invalid levies, with the purpose of deterrence, discouragement, and misdirection of any pursuit of statewide, group or class or individual remedies by plaintiffs. Various defendants were engineers or executors of these due process violations. Plaintiffs' claims, on behalf of all Kansas single taxpayers (1988-1997), follow hereafter.

2. All named and class plaintiffs herein have been at all relevant times, and as of filing this Complaint are now, residents and domiciliaries of the defendant State of Kansas. During some or all of the years at issue, all plaintiffs paid amounts officially designated as "income taxes" to the defendant State of Kansas (which has already imposed,

assessed and collected such amounts via the offices and agencies of the other individual defendants and Departments and Divisions), under the admonition of purported Kansas law. Such amounts were computed pursuant to a separate schedule of "single" graduated income tax rates, and in many cases under tables reflecting such rates, all of which were published and distributed to taxpayers by the defendant Kansas Department of Revenue. At all levels of Kansas individual taxable income (compared to those imposed on a married person per capita), there is a cumulative targeted burden on single persons' income contained within such separate rate schedule. Such burden functions as a "surtax," is systematic, and is mathematically precise in all cases.

3. Plaintiffs assert that such purported Kansas single persons' income taxes were collected and retained under 1988 (and later) legislative bills which were partially invalid under the Kansas Constitution as legislative enactments, which parts (and the singles "surtax" contained therein) were consequently null and void, under State law and Federal due process. Thus the amounts at issue levied against each Kansas single taxpayer were not legal imposts or collections or taxes of the State of Kansas, but have been wrongfully levied, received, retained and used by Kansas (without refunds or just compensation). Therefore, plaintiffs further assert that (i) the collection of such "taxes", (ii) the denial of refunds to date by the defendant State of Kansas, and defendants Kansas Department of Revenue and Director and Department of Taxation (and by individual Secretaries, Directors, agents, officials, "designees" and others) , and (iii) a pattern of public conduct of defendants and others designed to deter, obfuscate, and chill the individual pursuit of refund remedies

by single taxpayers, all taken together deny legislative and administrative due process to single taxpayers under the Fourteenth Amendment to the United States Constitution. The retention of the amounts at issue further amounts to an organized "taking" under the Fifth Amendment to the United States Constitution, under the Kansas Bill of Rights, and as incorporated against the States under Fourteenth Amendment.

4. Plaintiffs further assert in this federal court that the purported Kansas income tax statute of 1988 (and three successors), under which Kansas commenced (and continued through 1997) to collect separate and higher rates on taxable income of single persons, *on its face*, monetarily burdened and deprived Kansas single taxpayers in their free exercise of their several fundamental civil rights under the Preamble and the First and Fourteenth Amendments to the United States Constitution and under the Kansas Bill of Rights. The basic fundamental right herein asserted is the personal right to be and remain single during any given period of years. The statutes purportedly enacted by such bills contained and directly imposed a new, unnoticed, separate, systematic, discriminatory, and mathematically precise excess rate levy and targeted financial burden, having the effect of a "singles surtax," on plaintiffs' fundamental right to be and remain single, and thus deprived them of property and denied them equal protection (compared to individual married persons). The top bracket of the separate singles' "tax" rate schedule itself was first held unconstitutional on "rational basis" grounds in 1994, by a Kansas district court. On interlocutory appeal, the Supreme Court of Kansas reversed, in effect speculating that since marriage is good and should be encouraged, the excess levy on single persons was somehow

valid. That court apparently dared not venture beyond the goodness of marriage to scrutinize exactly why all single taxpayers should pay the levy complained of herein, which infringed directly and annually their own fundamental right to be and remain single. It also ignored the disparate impact of the tax on single women, who outnumber single men in Kansas, and who cannot (each and everyone) be taxed into marriage.

JURISDICTION

5. Jurisdiction over the claims and parties asserted herein is founded on 28 U.S.C. §1331; 28 U.S.C. §1343; 42 U.S.C. §1981 *et seq.*; 28 U.S.C. §1367; K.S.A. §79-3230(d); K.S.A. §79-3268(f); K.S.A. §79-4301 XI(d); K.S.A. §79-32, 109(a); Kansas Constitution Article XI §11, and the "arising under" federal question jurisdiction inherent in Article III, Section 2 of the United States Constitution. Under the facts and circumstances of this case, the court's exercise of federal jurisdiction over claims brought herein for a remedial Order for reassessment, leading to monetary refund relief, pursuant to this Complaint, is necessary for a full and fair resolution of plaintiffs' federal claims, under federal due process.

6. Plaintiffs herein each seek equitable relief in the form of an Order or Decree against defendants for a reassessment of valid Kansas income taxes, on single persons, leading to a money refund from Kansas of the unconstitutionally and illegally collected and retained excessive amounts (plus interest), which were collected, used and retained by defendants herein, from single income tax payers of Kansas, for all the years 1988-1997; plaintiffs seek a full and fair

hearing of all their claims meeting federal due process standards of adjudication in an independent forum, and full exercise of the power of this court in the determination and enforcement of the Order for such reassessment and monetary refund sought herein; plaintiffs seek a declaratory judgment on the *res judicata* matters dealt with in Count IV.

7. Plaintiff Merritt has pursued state administrative remedies seeking Kansas refunds (for 1988-1995) as far as such purported remedies are prescribed and discernible, under Kansas law. Plaintiffs believe that most members of the plaintiff class of single Kansas taxpayers will not have become aware of the nature and amount of their claims. Because of (i) a public course of pseudo-official conduct aimed at denying, mis-directing, deterring, delaying and chilling the individual pursuit of legal refund claims by single taxpayers, and because of (ii) the ultimate substantive inadequacy of Kansas administrative remedies, as afforded and literally prescribed by Kansas (where the relevant purported state legislative acts are asserted to be void as a matter of Kansas law or where the statute is challenged as facially unconstitutional), such remedies are meaningless, and would not lead to group-wide or class refund relief, absent an act of the Kansas legislature. Neither the Kansas Department of Revenue nor the Board of Tax Appeals has judicial jurisdiction or competency to declare the "tax" unconstitutional on its face. Yet defendants have purported to direct and control an "administrative" refund remedy, via the acts of various individual defendants acting under color of Kansas law, which leads only to "review" of administration. Any prospect of a plain, efficient or speedy "administrative" or judicially sanctioned reassessment refund remedy, or

group or class refund relief, will founder under current Kansas Judicial practice which in fact would demand a multiplicity of separate lawsuits after more "administration."

8. As to members of the plaintiff single taxpayer class who have not filed administrative refund claims to date, based on plaintiff Merritt's actual experience, and that of others, pursuit of such claims would be futile, pointless, and detrimental to their interests, because of Kansas' clear financial interest in denial and delay. Any further "administration" to be done by the Kansas Department of Revenue in this matter, in fact, should only be to effectuate the reassessment order and refunds sought herein, after the "singles surtax" is judicially found to be invalid and unconstitutional. Judicially, current Kansas practice would require more "administration," but would not be plain, speedy or efficient, within the meaning of 28 U.S.C. § 1341.

9. Defendants have sought to mislead and mis-direct all single taxpayers of Kansas into the belief that their extant claims for refunds (and the monetary amounts involved) were being or have been fully and fairly litigated in the courts of Kansas (which they in fact and in law have not been). Whether *choses in action* or formal claims, defendants have sought to extinguish such claims by "administration." Defendants have sought to deter such Kansas single taxpayers from thinking through and asserting their own personal fundamental constitutional rights and interests and their own monetary claims based on the organic and facial invalidity of the tax bills complained of, and as to the illegality of the purported "taxes" collected and retained by defendants herein. Thus, defendants, holding public offices of trust, have

published to their own citizens, domiciliaries and taxpayers the representation that they can render "judgments" on denied administrative claims, while having induced a belief that a simplified administrative claim would receive full and fair attention. They have published the further representations (as to administrative hearing refund claimants) that their "orders" are *"binding"* until there is a ". . . final resolution by the Kansas appellate court system . . . ." They thus falsely represent that a prior Kansas case, not involving a complete assertion or adjudication of all Kansas single taxpayers' fundamental, reassessment and refund rights, would be or is dispositive. Such conduct and such representations also falsely imply to citizens of Kansas that certain individual defendants (who are administrators and not part of any judiciary) solely control the claims route and the remedy, via "administration." Coming from public officials in positions of trust, these representations are in violation of defendants' duties of candor and fairness to their own citizens. The result, *inter alia*, is a denial of due process to Kansas single taxpayers under the Fourteenth Amendment to the United States Constitution, cognizable under 42 U.S.C. § 1981 *et seq*.

10. The motivations and objects of the defendants' aforesaid conduct (as revealed by the results obtained thus far) are that (i) an entire class of Kansas single taxpayers who have not been or are not in the "top brackets" of taxable income reached by the purported laws at issue, for any or all of the relevant years (1988 to 1997), would remain unaware of its extant reassessment and monetary claims (and thus such class has been unrepresented and its fundamental rights and liberty interests are unasserted), (ii) a purported class of

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Kansas single taxpayers certified only at the District Court level in a prior separate Kansas state court action (had it received any notice) would be mis-led into believing that its monetary claims were determined by "top bracket" tax rate discrimination only, and that (iii) all Kansas single taxpayers would be lulled, misinformed and deterred into doing nothing, or into merely filing meaningless administrative refund claims (which have led to an allegedly "binding" halt). The clear intended result has been, indeed, that Kansas single taxpayers seem to have given up the matter, and Kansas has achieved a "taking" of their property via collection and retention of invalid levies on single persons, under the Fifth Amendment, cognizable in this court.

11. Defendants persisted in collecting these discriminatory "taxes" through 1997, under color of administrative authority and Kansas law, which "law" indicates no clear judicial remedy absent an act of the legislature. The obvious intended, financial windfall to the Kansas fisc was that, as new income taxes (including the "singles' surtax") were collected from single persons for each fresh year, through 1997, a claim limitations argument would exonerate Kansas from exposure and liability for reassessment and refunds to all Kansas single taxpayers (with respect to their claims for money refunds for a notionally or arguably expired or barred past income tax year). This course of conduct by defendants, holding positions of public trust, amounts to the levy, exaction and maintenance of an enforced and annually supplemented separate and excessive pain, penalty, and financial contribution from single taxpayers. The effect of the foregoing has been the creation of a constructive or resulting state pool of financial liquidity, or deferred liability, administered by

defendant State Treasurer. The financial benefit of such liquidity has been secured to Kansas as long as it can litigate against and otherwise deter and forfend the bringing of reassessment and monetary refund claims by single taxpayers in a proper judicial forum. Defendant State Treasurer is a defendant because he is a party in control of Kansas funds against whom relief can be granted. The Kansas Department of Revenue is a semi-autonomous agency of Kansas which collects, and pays over revenue to defendant State Treasurer, for general revenue purposes for Kansas. It has had numerous Secretaries, Directors of Taxation and other employees during the years at issue. [One of these former Secretaries sits on the District Court of Shawnee County. One of the former Directors of Taxation sits on the Kansas Board of Tax Appeals]. An *Ex Parte Young* "suit" lies against these defendants under K.S.A. § 79-3230(d).

COUNT I

12. Kansas has traditionally imposed an income tax on individuals, pursuant to the authority of Article 11 § 2 of its Constitution (which permits a tax on individual income, not marital status). Since the first enactment of a statute imposing such income tax, there was one uniform graduated individual rate schedule, imposing higher rates of tax on progressively higher bracketed amounts of taxable income, until 1988. Kansas has traditionally permitted joint returns and income splitting by married couples, under a statutory provision that the joint tax on a married couple filing a joint return would be determined by halving the combined (joint) taxable income of the married couple, by then applying the statutory uniform graduated individual rate schedule to such (halved)

amount of taxable income, and by doubling the resulting amount. See all the pre-1988 versions of K.S.A. § 79-32,110. The pre-1988 method ameliorated the effect of progressively higher percentage rates of tax on higher amounts of taxable income, where a married couple was involved, and allowed for the fact that two people lived on the joint income. As a matter of legislative grace, Kansas has allowed various deductions and exemptions. It has never, before 1988, targeted a class of individuals for a separate surtax or excise or levy based on marital status. In 1988, the draftsmen created a new separate dual rate regime, under which the relevant bill simply gave married taxpayers lower separate income tax rates; single taxpayers got a pain, penalty, surtax and invalid levy.

13. Historically, in the Preambles of bills imposing or changing the uniform individual income tax rate schedule, the prior Kansas draftsmen had stated, and thus had placed the legislators and public on notice, that the relevant bill was "... concerning ... rates of liability of an individual...." Until 1988 this was of course candid and true, since there was historically but one uniform statutory individual graduated rate schedule. In 1988, the use of such bland words in the Preamble to Ch. 381, 1988 Session Laws (Vol. 2) (with nothing else), to describe the imposition of a completely new dual rate structure for Kansas, which directly imposed a systematically discriminatory "singles surtax," was false and misleading, both to the voting members of the Kansas legislature and the public.

14. Historically, where a new or separate tax was involved, the draftsmen would notice such measure in the

Preamble of the relevant bill. Thus, even in 1988, draftsmen inserted notice in the Preamble to Ch. 381, 1988 Session Laws (Vol. 2), to the effect that a new corporate alternative minimum tax was imposed by the proposed new statutes contained in the bill. But the "singles surtax" was buried.

15. The first relevant bill (described above) came to the Kansas legislature and the public and later the Supreme Court of Kansas with no candid notice or Preamble, no legislative history, no committee reports, and it contained no legislative declarations or findings as to the state of married life (or single persons' lives) in Kansas. It was in form a tax bill. Likewise, there was no other bill in pari materia or any separate committee report indicating a need for action as to the lesser cultural or societal worth, or any relatively greater iniquity or ability to pay, of single persons. The draftsmen likewise reported and stated nothing about the (also unnoticed, "buried" and very significant) repeal of the federal income tax deduction, as being more appropriate in degree for single persons than for married persons, which lurked in the deep text of the bill. There was not any other obvious indication of the subject, object or purposes of such bill. Nothing in the Preamble would have indicated a social marital welfare program, or a separate levy or penalty on single persons. The legislature seems to have bought the bill, as was.

16. The foregoing bill as a matter of form versus substance (easily seen in the precise and real mathematical bite of the "singles surtax" buried therein) appeared to prescribe income taxes for the general purpose of Kansas government. In fact, as an exercise of taxing power it was surreptitious, misleading, multiplicitious, and thus null and

void, under the Kansas Constitution, to the extent that it contained a separate, buried, systematic, new, different, unnoticed and discriminatory levy on Kansas single taxpayers, at any and all levels of Kansas taxable income, under equal protection and due process doctrine, at any level of good faith scrutiny.

17. In the form and style presented, and with no notice, history or findings as to its discriminatory content, the 1988 bill (and its successors) was not a valid exercise of the police power, the social welfare or benefits power, or any household budget or lifestyle regulatory power of the State of Kansas, and was not a valid statutory enactment under Article 2, § 16 and Article 11, § 2 and § 5 of the Kansas Constitution. The collection (to 1998) and continued retention of the "singles' surtax" amounts by Kansas therefore, and in addition, has violated both federal and Kansas due process.

18. The statute contained in the foregoing bill sought to impose, for the first time, a separate graduated rate structure and arithmetic regime on single persons, by further dividing the existing K.S.A. § 79-32,110(a) into subclauses, or schedules: "(1)" as to "married" individuals, and "(2)" as to all other individuals. Via this surreptitious draftsmanship, single individuals were (for the first time) separately dealt with, and subjected to uniformly higher rates and cumulative amounts of Kansas "income tax", compared to the rates imposed on the commensurate respective deemed income of a married person. Far from a mere relief device of income splitting (as Kansas had traditionally granted to married couples), Kansas targeted, layed and levied higher rates of "tax" on single persons. It was thus "taxing" single persons,

not Kansas taxable income of all individuals, with mathematical precision and systematic excess. The separate rates were adjusted by the legislature in 1989, 1992 and 1997, but no general relief from the discriminatory burden was granted to single persons until 1998.

19. The following table discloses the additional surtax, or burden, which is imbedded into K.S.A. 79-32, 110 for all the years at issue (since 1988), on single people. It assumes three individuals: A and B are married; S is single. The table demonstrates that the surtax, or additional burden on S, is systematic, up and down the brackets. It is assumed that A, B and S all have equal Kansas taxable incomes (though A and B could be splitting and combining differing amounts of their separate incomes). It is assumed that A and B file a Joint Kansas income tax return, using the systematically favorable "statutory" joint rates. The burden of the rate excess, or "surtax," is depicted in the far right column:

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Years		Taxable Income of each (A, B, S)	Maximum Kansas Joint Rate on A+B	Kansas Rate on S	Surtax Burden on S
1988:	to	$13750 each	4.05%	4.80%	18.52%
	to	17500 each	4.05%	4.80%	18.52%
	over	17500 each	5.30% (to 27500)	4.80%	—*
	over	27500 each	5.30%	6.10%	15.09%
1989-91:	to	13750 each	3.65%	4.50%	23.29%
	to	17500 each	3.65%	4.50%	23.29%
	over	17500 each	5.15% (to 27500)	4.50%	—*
	over	27500 each	5.15%	5.95%	15.53%
1992-96:	to	15000 each	3.50%	4.40%	25.70%
	to	20000 each	6.25% (from 15000)	4.40%	—*
	over	20000 each	6.25%	7.50%	20.00%
	over	30000 each	6.45%	7.75%	20.16%

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* In each of the statutory periods, there is one intermediate internal bracket area in which the levels of taxable income graduation, set in the separate schedules, produce a lesser *maximum* percentage rate on singles, but this area is confined to $10,000 as to singles (from $17,500 to $27,500) for 1988-1991, and for 1992-1996, it is confined to $5,000 (from $15,000 to $20,000). ***However, in each of these intermediate areas, the systematic burden, imposed by the prior singles' surtax rates on the initial or lower bracketed income, always results in more cumulative Kansas income tax on S than on A or B.*** Then, the surtax resumes as taxable income moves up and out of such intermediate area.

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In all the statutory periods, there is a clear systematic rate discrimination and cumulative burden against single people. The burden is achieved, with mathematical precision, by levying higher rates on the initial levels of Kansas taxable income, and by levying higher rates on the top (or infinite) amounts of Kansas taxable income. The substance of this regime is a prescriptive "surtax," or separate excise, which is directed solely at single persons. In 1997, the lowest bracket of single persons was reduced to 4.1% of the first $20,000 or $820; a married individual with commensurate income would pay more ($837.50), because of the secondary regression ($15,000 to $20,000 each) on married persons. Then the surtax resumes and penalizes single people.

20. Under the Constitution of Kansas and savings clauses of K.S.A. § 79-3239 and § 79-32,108, the entire "singles surtax" (not just one selected bracket and rate) is invalid and must be held void. Since the legislature did intend to tax single individuals in 1988, as clearly indicated in the relevant Preamble, the valid subclause which survives (the "joint" rate schedule), should be judicially construed to impose a valid income tax on single individuals. As to single persons, the current effective and valid graduated income tax rate schedule would be found by simply halving the graduated bracketed amounts of taxable income (found in the surviving "joint" subclause of the statute) and applying the same percentage rates to such (halved) amounts as are set in the statute for a married couple. The Kansas legislature finally did this (in time for the elections) in 1998; it partially reduced the "burden" in 1997, and told the Supreme Court of the United States it had been repealed.

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21. Single taxpayers of Kansas (and each and every one of them), for all taxable years since 1988, are entitled to cash refunds of amounts they have paid to Kansas, as purported "income taxes," to the extent such amounts exceed the respective correct graduated income tax, surviving under K.S.A. § 79-32,110, as alleged and explicated in paragraph 20 of this Complaint, with interest, under Kansas law, which also entities them to a "suit." Such refunds and the interest thereon, are hereinafter sometimes referred to as "excess amounts." Due process mandates this remedy, which is for an ongoing exaction and retention of illegal levies (and which otherwise is an unconstitutional "taking"), continuously since 1988, under color of Kansas law. The proper administrative role for the Kansas Department of Revenue is to reassess the relevant income taxes of all such taxpayers for the relevant years and to refund the "excess amounts."

COUNT II

22. Plaintiffs hereby re-allege the foregoing paragraphs of this Complaint.

23. The continued collection, retention and use of all the "excess amounts" alleged in Count I hereof, by Kansas, through the agency and coordinated action of all the other defendants, all violate legislative and administrative due process to Kansas single taxpayers under the Kansas Bill of Rights, and under the due process clause of the Fourteenth Amendment to the United States Constitution. Such "excess amounts" are not imposed under validly enacted Kansas law, and such amounts belong to the single taxpayers (and each and every one of them) who were induced to pay them in.

The continued collection and retention of such "excess amounts" under color of Kansas law, by the various officials named herein, therefore violates the federal civil rights of single Kansas taxpayers under 42 U.S.C. § 1981 *et seq*.

24. Kansas law does not provide an administrative agency (or executive branch official) which has organic judicial competence to adjudicate the validity of the enactment of a bill (or a part thereof) by the Kansas legislature. But the individual defendants herein, in violation of their due process duties of candor, truthfulness and fairness, in violation of their duties of public trust, have countenanced the filing of administrative claims with no special grounds or amounts, while representing that they control an administrative remedy which does not exist under Kansas law. The individual defendants have encouraged single Kansas taxpayers to look to them, and to sleep on their fundamental rights and in so doing have violated federal and Kansas procedural due process to Kansas single taxpayers.

25. The proper function of the Department of Revenue, Secretary of Revenue, and the other defendants could only be the ministerial processing and payment of refund amounts *after* it is judicially determined that the "excess amounts" have been illegally and unconstitutionally retained by Kansas. To the extent that defendants have arrogated to themselves the role of determining, defending, "adjudicating," and publicizing inaccurate and misleading information about taxpayers' remedies under the circumstances of this case, they have acted *ultra vires* their authority, in violation of separation of powers doctrine of the Kansas Constitution, Kansas due process, and federal constitutional due process,

all in coordinated violation of 42 U.S.C. § 1981 *et seq.* The result is an Article V "taking" by Kansas.

26. Kansas single taxpayers' damages under this Count II are as alleged in paragraphs 20 and 21 of this Complaint, and for attorneys' fees and costs attributable to the preparation and prosecution of this action. Defendants' conduct since the first challenge to the "singles' surtax," as adversarial tax collectors, has been without authority, unreasonable in fact and law, and unconstitutional as alleged in this Count II and elsewhere, and denied personal rights to individual taxpayers, all in the name of "State power." If damages are declined, then taxpayers seek the Order prayed for in paragraph 31, *infra*.

COUNT III

27. Plaintiffs hereby reallege the foregoing paragraphs of this Complaint.

28. Plaintiffs hereby assert and allege that they have a fundamental right under the United States and Kansas Constitutions (and a retained right under the Kansas Bill of Rights) to be and exist and remain single, during the relevant years.

29. The actions of Kansas, its relevant agencies and departments, and the class defendants herein, seeking to impose, collect, retain, justify, publicly minimize the burden of and deny a meaningful remedy for, and legitimate the systematic singles surtax described herein, amount to an unconstitutional discriminatory and excessive burden and

penalty on single taxpayers, in violation of single taxpayers' fundamental rights under the equal protection clause and due process clause of the Fourteenth Amendment to the United States Constitution, and taxpayers' rights of conscience and free exercise under the First Amendment and their "liberty interest" in *being* single under the foregoing.

30. The burden of the purported tax heretofore alleged, which amounts to a surtax on the income of single persons at all levels and in all instances, is systematic and targeted, as depicted in paragraph 19 hereof. Such surtax is not merely incidental to random cases: it is structured so that it can only impose higher tax, up and down the income scale, on single persons. It is not an accidental effect of rate graduation and is thus unlike the federal system, which has never targeted married or single people.

31. Plaintiffs request that after heightened scrutiny, this court hold the singles surtax, under which Kansas has collected the "excess amounts" alleged in paragraphs 20 and 21 hereof, since 1988, unconstitutional on its face, and enter its Order for a reassessment of the correct Kansas income tax, by defendants, pending the creation of a state procedure leading to a monetary refund of such excess amounts, for 1988-1997, under the supervision of a Master or Referee to be appointed by this court within a period to be set by the court. Plaintiffs also seek attorneys fees and costs for the prosecution of this action, as prayed in paragraph 26 of this Complaint.

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COUNT IV

32. In a prior Kansas state court action, styled *Peden v. Kansas*, 930 P.2d 1, 261 Kan. 239 (1996), K.S.A. § 79-32, 110 was challenged on "rational basis" equal protection grounds. Those plaintiffs did not raise any fundamental right or liberty interest involved in being and remaining single, either in the trial court or in the Kansas Supreme Court (Count III hereof). Neither did those plaintiffs raise the Kansas constitutional or federal due process or "takings" issue surrounding the invalid "enactment" of the relevant legislation and the retention of the illegal amounts (Count I hereof). The § 1981 and related matters alleged in Count II hereof seem to have arisen during the pendency of that action, and have continued to the present.

33. The Supreme Court of the United States has denied a petition for certiorari in such prior case, and defendants have publicly represented that such action is therefore dispositive of the rights of all Kansas single taxpayers. Defendants have falsely represented that such case should be accorded authority, as justified by "state power," and have falsely induced a belief that Kansas single 'taxpayers' refund rights are finally determined thereby.

34. Defendants have deliberately and separately represented to administrative refund claimants that their monetary claims and legal rights were somehow bound up with such prior state court action.

35. No publication or notice as to refund amounts, the income brackets of the asserted "class", or opt out rights

was ever published by the court system of Kansas, or at its direction, or by those plaintiffs, as to the foregoing case. In fact, the surface issue therein dealt with is not probative much less controlling over the fundamental rights and due process matters dealt with herein.

36. It would violate federal due process for this (or any) court to accord any judicial, preclusive or precedential significance to such prior case as to the parties, claims, issues, years involved, and amounts and burdens raised herein, which are completely different. Such prior case, as a mere matter of "rational basis" speculation, is further infirm in that it ignored census data as to men and women in Kansas. There are too many single women to tax them all into marriage.

37. Plaintiff Merritt filed an opt-out with the District Court of Shawnee County, Kansas, where the prior case originated, on March 7, 1997, exercising his federal due process right to pursue his own claims. In this opt-out, he raised notice and opt-out issues, *inter alia*, which would apply to all single taxpayers. There has been no action by that Court.

38. All single Kansas taxpayers, who have been induced to sleep on their rights, have not been given notice, or the opportunity to opt out of such prior state court action, in any clear or explicit manner, at the instance of any party. It would deny federal due process to deny them a hearing in this action in this federal court, since Kansas would insist they all file their own lawsuit. K.S.A. § 79-32,110 received a purported *de novo* review in the Supreme Court of Kansas in such prior

action, and was sustained, based on a "speculated" and fictitious exercise of police power. This fictitious power would burden (invalidly) fundamental personal rights to be and remain single. There is no state group wide or state wide remedy at present, much less one which is clear, certain, speedy or viable.

39. Plaintiff Merritt requested of defendants waivers of any applicable period of limitation for filing suit, and supplemented his original refund claims, on March 19, 1997, having first filed administrative refund claims for 1988-1995 in April, of 1996. There has been no response. Defendants have taken no cognizance of, or action on, plaintiff Merritt's original refund claims other than to (i) deny them, (ii) represent that their "judgment" would "stand," and, (iii) send him superfluous information and misleading representations about the *Peden* case, and to (iv) hold any hearing (as requested) "in abeyance" and purport to "bind" him. None of the foregoing amounts to responsible "action" within the meaning of K.S.A. § 79-3230(d).

40. Any purported "action" by defendants would be (and heretofore has been) utterly meaningless, since defendants have no constitutional adjudicatory or remedial authority in a case where the facial validity of a Kansas tax statute is challenged. As to 1996, taxpayer presented arguments in a hearing against assessment of the "surtax" for that year, and has heard from the Department of Revenue that "there is no fundamental right to be single. . . ."

41. Kansas has consented to be sued under K.S.A. § 79-3230(d), as indeed it must, since it enforces and collects

anticipatory withholding and estimated income tax amounts regularly during each year and has due process and Fifth Amendment obligations as to refunds and viable remedies for taxpayers who might overpay as a result of constitutional violations by Kansas. The Kansas income tax system is an analog of the federal system and literally permits a "suit." Defendants act as though a "suit" is a sentence into internal administration, leading nowhere. It may be that Kansas judicial doctrine in fact seeks to abrogate § 79-3230(d). The resulting construction of § 79-3230(d) is this action, under the federal analog in the Kansas Constitution and its statutes, which is a "suit" in a real court, based on the analogues of U.S.C. § 1346 and § 1491, and provisions of the Internal Revenue Code granting a clear refund action. As to single persons employed by Kansas employers, there is no pre-deprivation remedy as to the "excess amounts" collected and retained by employers and defendants, because of an automatic anticipatory wage withholding tax system maintained by Kansas. As to self-employed persons, the result is the same via required estimated payments.

42. Plaintiffs herein ask for a declaratory judgment that (1) *Peden v. Kansas* is not *res judicata* as to the Kansas enactment and due process claim (Count I), civil rights claims, fundamental rights claims, Fifth Amendment claims and remedies prayed for in this case, and (2) that they have a fundamental right to be and remain single which is constitutionally burdened by the "tax" complained of herein.

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CLASS ACTION ALLEGATIONS

43. All the scores of thousands of single persons who have paid income taxes to Kansas for the taxable years 1988-1997 suffer alike from the same discriminatory rate schedules, whether they had $500 or $5,000,000 of Kansas taxable income in any given year. Mathematical differences in the amounts paid are immaterial, as are factual differences in the returns. The rate schedule applied to all single persons is wrong for each and every year. Refund amounts can be handled during the reassessment after this case is resolved on the merits. Joinder of all single taxpayers is impracticable.

44. Named plaintiffs herein have claims which are typical of the class. Merritt pursued purported administrative remedies as did many other single taxpayers (which was utterly pointless); plaintiff taxpayers believe that many other taxpayers knew nothing about the matter and did nothing. The result is the same. Kansas has provided no remedy to anyone; certainly defendants' "administration" operates on the entire class, within F.R.C.P. § 23(b)(2). All single Kansas taxpayers suffer from the "singles' surtax."

45. Other persons may intervene herein, and be appointed as class representatives, but for the present, plaintiff Merritt has claims typical of the class, and will fairly and adequately represent the class. This action is filed today on behalf of all single taxpayers to maximize claimed refunds and secure group wide or "class-wide" relief of which is "superior" under F.R.C.P. § 23(b)(3).

46. A class action will be superior to other means of adjudication, because of limitations issues as to refunds sought, and since all Kansas single taxpayers have been misled by defendants as to their rights, under F.R.C.P. § 23(b)(2). Once the tax has been held unconstitutional, monetary determinations can be handled by individual reassessment and review. All class members cannot possibly (economically or practically) prosecute separate constitutional jurisprudential claims on the merits, but judge-made Kansas doctrine seems to require just this, a multiplicity of claims and lawsuits. All such class members who were single have an interest in the fundamental rights claims and other matters raised herein. There are no special difficulties with this case in securing the jurisprudential adjudication sought herein, in this forum.

47. Plaintiff Merritt has resided at 8037 Mohawk Drive, Apartment 201, Prairie Village, Kansas 66208 since 1984 (913-649-6097). He has filed returns with Kansas as a single taxpayer and paid the purported taxes shown to be due for 1988-1995, and filed refund claims with defendants in April of 1996. After such claims were denied, taxpayer requested a hearing, and was greeted by a communication from defendant Hager dated September 25, 1996 in which it is represented that all hearings are "in abeyance" pending *Peden*. Since then, Plaintiff supplemented his claims (March 19, 1997) and requested waivers of any statute of limitations on filing suit with respect to his claims (same date). *There has been no response or other action of any kind by any defendant as to 1988-1995*. Plaintiff believes that the fate of his administrative refund claims, 1988-1995, is typical of those single class members who even heard of the matter

and filed anything anywhere, which would have produced "no action." Plaintiff has sought to exercise his pre-deprivation remedies as to 1996, but under distraint paid an invalid assessment on March 24, 1999 and filed another (1996) refund claim thereafter. As to 1997, he has paid the "correct" tax to Kansas. Other class plaintiffs will have pursued various approaches to the problem, all with the same result. No adjudications; Kansas keeps the money.

48. Plaintiff Howerter has been a resident of Kansas and single since 1994. She has filed Kansas income tax returns as a single person, 1994-1997. She has pursued no administrative claims, on the initially plausible advice during the pendency of *Peden* that a group wide, class wide, or state wide refund remedy, based on a reassessment or other claims procedure, would be available after the relevant statutes were invalidated. She resides at 6800 Fontana, Prairie Village, Kansas 66208. Her claims are typical however, of a larger class, who did not, and could not, have taken meaningful separate personal action to vindicate their constitutional rights.

REASSESSMENT ORDER

49. If the court declines to certify a class action, plaintiffs nonetheless request an Order that valid Kansas income taxes be reassessed, as to all single persons who paid such taxes, 1988-1997, and that refunds of the excess amounts be issued to such persons, again under the supervision of the Master or Referee requested in paragraph 31 hereof, unless a more appropriate State remedy is found.

50. Plaintiffs hereby designate the United States Courthouse at Topeka, Kansas as the place of trial.

WHEREFORE, plaintiffs pray for the Order, Declaratory Judgment and Class Certification outlined above, or such other relief as shall appear fair and just.

Respectfully submitted,

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(2)

No. 01-624

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAROLYN ANN LAFAVRE, also known as Carolyn A. Howerter, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers who reside in Kansas,

Petitioners,

v.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE; TIM SHALLENBURGER, as State Treasurer of Kansas; STEPHEN S. RICHARDS, as Secretary of Kansas Department of Revenue and as acting Director of Kansas Division of Taxation; DAVID J. HEINEMANN, as agent and designee of Secretary of Revenue, and of Director and Division of Taxation of Kansas Department of Revenue, and as representative defendant of a class of employees and agents of Kansas and the Kansas Department of Revenue,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15.8, petitioners wish to call the Court's attention to the intervening matter discussed below, which was not available when the instant petition was filed on October 10, 2001.

Petitioners continue their prayer that the writ of certiorari be granted, but suggest that the Court may instead wish to reverse the panel opinion below, and remand for reconsideration in light of (i) *Correctional Services Corporation v. Malesko*, No. 00-860, __ U.S. __ (November 27, 2001) (for re-examination of the panel's premise that equitable restitution of citizens' own property = damages at law), and in light of (ii) the grant of certiorari in *Lapides v. Bd. of Regents of Univ. of Georgia*, No. 01-298 (granted October 29, 2001). This Court's decision in *Lapides* will involve the "clear statement rule" and a re–examination of *Ford Motor Co. v. Dept. of Treas. (Ind.)*, 323 U.S. 459 (1945) (a state corporate tax case). Ultimately *Lapides* will involve attention to the fundamental matter of the judicial power of the United States.

Petitioners have also requested a review of the "clear statement rule" in this case, as applied to state statutory enactments. Pet. for Cert., No. 01-624, ii, 11-12, 14-15, 27-28. Much of the same ground is involved.

I. *Correctional Services Corporation* v. *Malesko*, No. 00-860, __ U.S. __, Decided November 27, 2001, Illustrates the Distinction Between the Concept of Implied Tort "Damages" Which Might be Awarded in an Action at Law, and the Equitable Remedy of Ministerial Reassessment Sought Here in a "Suit in Equity" Against State Officials Under 42 U.S.C. § 1983. The Panel's Decision Below Clearly Does Not Recognize This Fundamental Difference (Pet. App. A, 7a, *et seq.*), and Under Supreme Court Rule 10(c) it Should be Elaborated by the Court.

Correctional Services Corporation v. Malesko, *supra*, deals with the matter of an "implied" (and tort-based) damages remedy for personal injury, and at the same time clearly states that

". . . injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." (Rehnquist, C. J.). The reciprocal principle, presented by the petition herein in Questions 2 and 3, is simply that the distinct "suit in equity" granted in 42 U.S.C. § 1983 will lie against the relevant state officials with the object of securing an equitable order to effect a reassessment of valid Kansas income taxes, if the relevant levying statutes (K.S.A. § 79-32, 110(a)) (Pet. App. D, 22a-26a), are struck. An order for remedial accounting work to be done in the future is not the same as damages at law, chastising a Kansas prison guard.

The reassessment remedy sought herein would not impose "asymmetrical liability costs" on Kansas, in tort, but would result in perfectly symmetrical restitution or credit of the invalid amounts of the relevant levies, which came from petitioners' own funds, dollar for dollar. *See* Rehnquist, C. J., in *Correctional Services Corporation v. Malesko*, *supra*. Constitutional practice has long recognized a distinction between refunds of illegally collected sums, and "damages." Pet. for Cert., 12-14, 21 n.7. So has Congress. Cf., I.R.C. § 7423, 26 U.S.C. § 7423 (which originates in the days of the federal officer suit). Below, the panel did not. This is a matter for review under Supreme Court Rule 10(c).

Petitioners' fundamental problem, also distinguished in *Correctional Services Corporation v. Malesko*, *supra*, is simply that whereas Malesko had a tort remedy elsewhere, petitioners do not.

Kansas has collected the challenged levies from several hundred thousand single citizens wholesale, under a mass self-assessment and return filing system, but now insists on a retail case by case administrative review procedure for credit or refund. Dean v. Kansas, 250 Kan. 417, 826 P.2d 1373 (1992) (where the systematic statewide problem was indeed a mass levy of incorrect *rates*, not any question of discrete individual taxpayer car values). This state remedial regime is not viable,

plain, efficient, clear or effective, where a mass facial challenge is involved, on fundamental rights grounds. The problem is "hostile state invasion" via the levying statutes themselves, not the citizens, and not any administrative matter of citizen by citizen income determinations. The individual returns are already filed and refunds may be ordered by a court. K.S.A. § 79-32,105(c), Pet. App. 21a.

II. This Court Granted Certiorari in *Lapides* v. *Bd. of Regents of Univ. of Georgia*, No. 01-298, on October 29, 2001, Which Essentially Involves a Question of "Waiver by Conduct" on the Part of the Georgia Attorney General Under the Clear Statement Rule. The Instant Case Involves Kansas Legislative Consent via Statutory "Construction" Under the Same Rule.

Petitioners' fourth Question is simply whether an ambiguous state statute (enacted in 1933) providing for a "suit" (K.S.A. § 79-3230(d)), Pet. App. 20a, is to be construed to recognize a due process remedy in federal court (a "suit in equity"), where later evolved state doctrine in fact currently imposes a "clear statement" of practical citizen disremediation, under a state regime of administrative claims multiplicity. This is a problem (implicating Kansas legislative intent) requiring clarification here, under Supreme Court Rule 10(c). *Ford Motor Co. v. Dept. of Treas. (Ind.)*, *supra*, involved no such problem. Pet. for Cert., 11.

Thus, the inquiry here is, what courts and defendants did the Kansas legislature intend in 1933, when it enacted § 3230(d)? Manipulative conduct (as in *Lapides*) by a state Attorney General is not the problem, but the "clear statement rule" is. § 3230(d) doesn't in fact specify either a defendant or a court, or anyone's "capacity." It does not address the problem of a facial challenge to a mass levying statute, or the problem of mass equity if the levying statute is struck. The result of the panel's opinion below is that it is a dead letter. Petitioners argue that § 3230(d) means no more and no less than a simple declaration that timeless due

process principles mandate an effective judicial remedy, somewhere. Thus construed, K.S.A. § 79-3230(d) is "state of the art" for 1933 or 2001.

Both this case and *Lapides* involve the same underlying question of the judicial power of the United States. Petitioners urge that the relevant "background principle" of statutory construction is the federal constitutional due process mandate of effective state citizen access to judicial remedies in constitutional cases. Thus, in the instant case: "*It is not to be implied* from the statute in question *that the state intended to exclude, or supposed that it could exclude, from the Federal courts, jurisdiction of any suit to which the judicial power of the United States extended.*" *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 256 (1905) (italics supplied). Here, Kansas now purports to recognize "no suit" anywhere on original jurisdiction to correct mass constitutional repugnance and inequity. *Dean v. Kansas*, *supra*.

As in *Lapides*, the issue is whether the panel has gone too far with *Ford Motor Co. v. Dept. of Treas. (Ind.)*, *supra*. It is a matter for this Court to decide, under Supreme Court Rule 10(c). Cf., *Burrill v. Locomobile Co.*, 258 U.S. 34, 38-9 (1922) (Holmes, J.) (where a "clear statement" of attempted state citizen disremediation would have raised the question whether the state actually intended to "impair substantive constitutional rights"); *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968).

CONCLUSION

The reassessment remedy sought by petitioners, which is equitable, is not like the tort-based damages remedy for personal bodily injury declined in *Correctional Services Corporation v. Malesko*, *supra*. The instant case provides the Court with an opportunity to explain the distinction in the two remedies in the context of the "suit in equity" cognizable in federal court under 42 U.S.C. § 1983. Restitution is utterly symmetrical with the

deprivation or taking, *ab initio*, accomplished under a void state levy (or pain or penalty).

The panel's decision below diverges, in that its explicit *ratio decidendi* is that restitution = damages. Pet. App. 7a, 10a. This Court should address the problem under Supreme Court Rule 10(c). This Court has never held that there is a "special sovereignty interest" in keeping the proceeds of a void state levy. The panel's ipse dixit that a forum exists (Pet. App., 11a) does not solve the question of the citizen remedies actually available in that forum. *See Dean v. Kansas*, *supra*.

If *Lapides* involves manipulative state conduct, the tandem question posed here involves interpretation of an ambiguous state statute, in the context of a "multiplicitous" state administrative regime which disremediates Kansas citizens at large. See *Dean v. Kansas*, *supra*. This Court can decide whether such practical disremediation is a constructionally proper result, under remedial principles found in the due process clause of the Fourteenth Amendment, or whether preclusive doctrine under the Eleventh should apply.

If the Court sees fit, it could reverse and remand to the Court of Appeals for reconsideration of the questions raised, in light of *Correctional Services Corporation v. Malesko*, *supra*, and in light of this Court's ultimate decision after the reconsideration of *Ford Motor Co. v. Dept. of Treas. (Ind.)*, *supra*, implicated in *Lapides v. Bd. of Regents of Univ. of Georgia*, *supra*. Otherwise, petitioners pray that the writ be granted.

Respectfully Submitted,

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